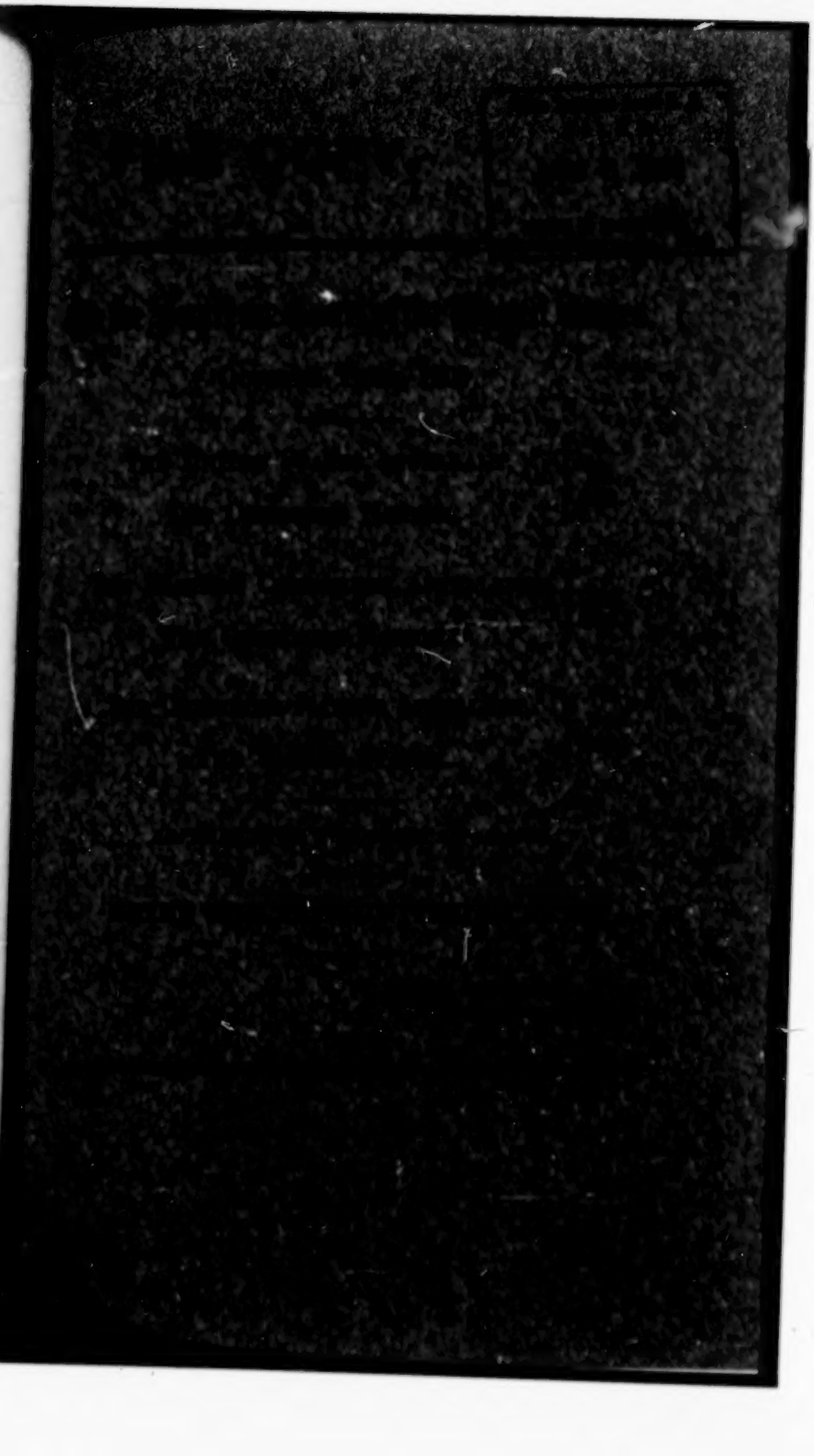

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT, *v.* THE CHEROKEE NATION,	No. 346.
THE EASTERN CHEROKEES, APPELLANTS, *v.* THE CHEROKEE NATION.	No. 347.
THE CHEROKEE NATION, APPELLANT, *v.* THE UNITED STATES.	No. 348.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The jurisdiction of the court in these cases was conferred through two acts of Congress, the first being section 58 of the act of July 1, 1902 (32 Stat. L., 726), giving jurisdiction to the Court of Claims to examine, consider and adjudicate any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States. This was followed by the act of

March 3, 1903 (32 Stat. L., 996), which provides that the section above referred to should be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all purposes of such section, and further that said section should be so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section on a claim mentioned in House of Representatives Executive Document No. 309, of the second session of the Fifth-seventh Congress. The claim thus mentioned is the same claim that is here in question.

Pursuant to these jurisdictional acts the Cherokee Nation filed a petition on February 20, 1903, in which they recited an accounting rendered pursuant to the treaty of March 3, 1893 (47 Stat. L., p. 64), by Messrs. Slade & Bender, asking for judgment upon such accounting as follows:

For $2,125 with interest thereon at the rate of 5 per cent per annum from February 27, 1819, until paid.

$1,111,284.70, with interest thereon at the rate of 5 per cent per annum from June 12, 1838, until paid.

$432.28 with interest thereon at the rate of 5 per cent per annum from January 1, 1874, until paid.

And further, for the restoration to the Cherokee funds the sum of $20,406.25, with interest thereon

at the rate of 5 per cent from July 1, 1893, until the date of restoration.

On March 20, 1903, a petition was filed on behalf of certain Eastern Cherokees living east of the Mississippi River, claiming their pro rata share of—

> That portion of the removal and subsistence fund improperly taken by the United States from the five million fund on account of removal of Eastern Cherokees, as found by the expert accountants, Messrs. Slade & Bender, April 28, 1894, the said five million fund being an interest-bearing fund in the hands of the United States, as trustee, and representing the money paid by the Government to the Eastern Cherokees for the sale of their lands in North Carolina, Georgia, and Tennessee, or east of the Mississippi River, as set forth in article 1st of the treaty of New Echota, in north Georgia, on March 14, 1835, and articles 2 and 3 of the supplemental treaty, proclaimed May 23, 1836, this sum so misapplied amounting, in accordance with said accounting, to $1,111,284.70, with interest at 5 per cent per annum from the date of said wrongful taking, June 12, 1838, to date. (R., p. 6.)

This petition was amended September 3, 1903, and at that time the parties plaintiff took the title of the Eastern and Emigrant Cherokees.

On March 14, 1903, a petition was filed on behalf of all the Eastern Cherokees, both west and east of the Mississippi River, alleging in substance that there was due to the Eastern Cherokees, upon the account of Slade & Bender above referred to, the sum of

$1,111,284.70, with interest from June 12, 1838, as an award against the United States or, if the court should not hold said account as an award, the sum of $1,761,447.27, with interest at 5 per cent from the same date, together with interest on the income annually accruing, at the rate of 5 per cent per annum until paid, by virtue of the treaties of 1828 (7 Stat. L., 313) and the treaty of 1835–36, commonly known as the "treaty of New Echota." At the trial of the case, however, no contention was made for this larger amount.

March 7, 1904, the various three cases were ordered to be consolidated and brought to trial as one case. As a result of the trial of the consolidated cases, judgment was entered decreeing that the plaintiff, the Cherokee Nation, recover the various amounts claimed by it in its petition; that the three smaller amounts be paid to the nation itself, and that the sum of $1,111,284.70, with interest at 5 per cent, from June 12, 1838, until the date of payment, after deducting certain costs and expenses, be distributed directly to the Eastern or Western Cherokees, who were parties either to the treaty of New Echota as proclaimed May 23, 1836, or to the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representative of such individuals. (R., 112–113.)

Only this main item of $1,111,284.70 and interest was contested at the trial by the United States.

The case was at first held by the court to be a suit in equity (R., p. 53), but subsequently,

and to save all question, at the request of the claimants various findings of fact were made by the court. These findings, however, amount practically to a mere compilation of facts appearing in portions of various official documents and records of which this court would take judicial notice without such findings, and hence they do not have the exclusive force and authority which is usually attributed by this court to the findings of the Court of Claims. Accordingly, in the following recital of the main facts in the case, reference will be made not only to the findings of fact, but also to various public documents and records where it seems necessary to supplement those findings.

THE FACTS.

Prior to the year 1808 the Cherokee Nation of Indians was domiciled in Georgia, Alabama, Tennessee, North Carolina, and South Carolina, where they owned and possessed about 14,000,000 acres of land. Subsequent to that date various treaties were made between the Cherokees, or certain of them, and the United States, as a result of which a portion of them removed west of the Mississippi upon lands given to them on the Arkansas River by the United States, their holdings east of the Mississippi being surrendered to the United States. By 1819 it was estimated that two-thirds of the Cherokees were east of the Mississippi and one-third west of that river.

On the 6th of May, 1828, a treaty was made with the Western Cherokees alone by which the United States agreed to put the Cherokees in possession of 7,000,000 acres of land in what is now known as the Indian Territory, and to give to the Cherokee Nation a perpetual outlet west of these lands (7 Stat. L., 311). The treaty contained an agreement to encourage the emigration of the Cherokees then east of the Mississippi by agreeing, among other things, to pay the cost of the emigration of any Eastern Cherokee who might desire to move west, upon enrolling himself for emigration, and his subsistence for twelve months after such emigration. On their part the Western Cherokees receded to the United States the lands which had been ceded to them on the Arkansas.

About this time the Cherokees remaining east of the Mississippi became involved in various difficulties with the authorities of the States in which they were residing, and were made subject to severe and oppressive laws in those States, all growing out of a desire for their departure. (*Eastern Band of Cherokees* v. *The United States*, 20 Court of Claims, 449; *The Cherokee Trust Funds*, 117 United States, 288.)

There grew out of this condition of things the treaty of New Echota, which was negotiated in 1835. It recited in the preamble the desire of the Cherokees to be freed from the difficulties they experienced in the States, and to be united in one

body in a permanent home without the territorial limits of the States' sovereignties.

By article 1 the Cherokees ceded to the United States all the lands claimed, owned, or possessed by them east of the Mississippi River, and all claims of spoliation of every kind, in consideration of the sum of $5,000,000, but with the further provision that there be submitted to the Senate of the United States the question of whether this sum was intended to include spoliations, and if not that an additional sum of $300,000 be allowed for the same.

Article 2 provided that $500,000 of said $5,000,000 should be applied in payment for an additional grant of 800,000 acres in addition to the 7,000,000 acres ceded by the treaty of 1828 and supplemental treaty of 1833 to the Cherokee Nation.

Article 9 made provision for the valuation of improvements and ferries in possession of the Eastern Cherokees.

Article 10 provided for investment of a portion of the $5,000,000 for the benefit of the Cherokees.

Other articles related to the payment of certain claims of individual Indians against white citizens of the United States and made provision for reservations and preemptions.

Out of articles 8 and 15 arose the controversy which is the subject of this appeal. The following is their full text:

> ARTICLE 8. The United States also agree and stipulate to remove the Cherokees to

their new home, and to subsist them for one year after their arrival there, and that a sufficient number of steamboats and baggage wagons shall be furnished to remove them comfortably and so as to not endanger their health, and that a physician, well supplied with medicines, shall accompany each detachment of emigrants removed by the Government.

ARTICLE 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment of improvements, ferries, claims for spoliation, removal, subsistence, and debts and claims upon the Cherokee Nation, and for the additional quantity of lands and goods for the poorer classes of Cherokees, and the several sums to be invested for the general national fund provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all of the people of the Cherokee Nation east, in accordance with the census just completed.

By article 16 it was stipulated that the Cherokees should remove to their new homes within two years from the ratification of this treaty.

Neither the "Western Cherokees," or "Old Settlers," nor the great body of the "Eastern Cherokees" were parties to this treaty, and they at all times up to the making of the treaty of 1846 repudiated it on the ground that its execution had not been authorized by them or their representatives in council.

The small number of Cherokees east of the Mississippi who negotiated the treaty were called or styled the "Treaty Party."

The leaders of the treaty party who had signed the treaty of 1835 contended that the sum of $5,000,000 was not intended to include the amount which might be required to remove them.

On March 1, 1836, the following supplementary articles, were adopted as part of the treaty by the Senate:

> ARTICLE 1. It is therefore agreed that all the preemption rights and reservations provided for in articles 12 and 13 shall be and are hereby relinquished and declared void.
>
> ART. 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars fixed by the Senate in their resolution of —— day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi River was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question; and whereas the President is willing that this subject should be referred to the Senate for their consideration, and if it was not intended by the Senate that the above-mentioned sum of five millions of dollars should include the objects herein specified that in that case such further provi-

sion should be made therefor as might appear to the Senate to be just.

ART. 3. It is therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and preemptions, and of the sum of three hundred thousand dollars for spoliations described in the 1st article of the above-mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund.

But it is expressly understood that the subject of this article is merely referred hereby to the consideration of the Senate, and if they shall approve the same then this supplement shall remain part of the treaty.

The treaty and the supplementary articles were ratified and adopted as one instrument and proclaimed May 23, 1836.

On July 2, 1836, Congress appropriated the sum of $600,000, pursuant to the terms of the third supplementary article of said treaty. This sum proved to be insufficient for the purposes for which it was appropriated. The majority of the Eastern Cherokees who were in the east subsequent to the ratification

of the treaty of the New Echota were greatly averse to emigration. They resisted every argument and persuasive means that could be used to induce them to be removed in accordance with the treaty, and the result was that in May, 1838, preparations were made by the Government to compel their removal, and Gen. Winfield Scott, with a military force, placed them in camps of concentration for that purpose.

On the 23d of May, 1838, the House of Representatives passed a resolution requiring a statement of the amount that would be required for the additional allowance proposed to be made to the Cherokees by the Executive Department. On May 25, 1838, the Secretary of War submitted the following estimate of what it would cost the United States to remove and subsist the Cherokees as proposed, to wit:

> In compliance with the resolution of the House of Representatives of the 23d instant, requiring a statement of the amount that will be required for the additional allowance proposed to be made to the Cherokees, I have the honor to present the following estimate:

The payment of expenses of removing the remaining Cherokees, estimated at 15,840, at $30 a head	$475,200
Amount applicable to that purpose	39,300
Balance to be provided for	435,900

If it should be deemed proper to make any further provision for the payment of the subsistence of the emigrants for one year after their arrival in the West, it will require, estimating the whole number at 18,335, thereby including those who have already emigrated, and allowing the amount stipulated to be paid by treaty, namely, $33.33 a head	$611,167
Total	1,047,067

(H. R. Ex. Doc. No. 182, Fifty-third Congress, third session, p. 10.)

On June 12, 1838, Congress appropriated the full amount estimated by the Secretary of War as sufficient to remove and subsist the Cherokees, as follows:

> SEC. 2. *Be it further enacted*, That the further sum of one million forty-seven thousand and sixty-seven dollars be appropriated, out of any money in the Treasury not otherwise appropriated, in full for all objects specified in the third article of the supplemental articles of the treaty of 1835 between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal west: *Provided*, That no part of said sum of money shall be deducted from the five million dollars stipulated to be paid to said tribe by said treaty: *And provided further*, That said Indians shall receive no benefit from said appropriation unless they shall complete their emigration within such time as the President shall deem reasonable, and without coercion on the part of the Government.

Shortly after this appropriation, the Cherokee Indians being at the time collected into camps and contracts having been entered into with some of the firms for their subsistence and removal, negotiations were entered into by representatives of the Indians headed by John Ross, principal chief of the tribe, with General Scott for the removal of the Indians by the nation. In the course of these negotiations a delegation was appointed by the Cherokees to make arrangements for such removal, and on the 31st of July these delegates submitted an estimate of the expenses which amounted to $66.24 per capita. This estimate was considered by General Scott to be extravagant, and he so informed the Cherokee delegates, but finally agreed to it after admonishing them that the cost as well as the comfort of removal was a matter in which the Cherokees were exclusively interested. (Report No. 288, 27th Cong., 3d sess., pp. 2, 10, 12.) Thereafter the removal was effected. The cost of it, however, proved to be greater than the contract price which, at $66.24 per head, amounted to $776,398.98. This amount was paid on the 13th of November, 1838, but the whole claim, as presented by Mr. Ross, was $1,263,338.38, or at the rate of $103.25 per head. This additional amount of $486,939.50 was rejected by the Commissioner of Indian Affairs, but was finally allowed by the Secretary of War, and on September 17, 1841, was paid to John Ross, the principal chief and agent of the Cherokee Nation,

specially authorized by the national council to apply for and receive the same.

In addition to this there was paid to John and Lewis Ross, August 16, 1841, on account of carrying into effect a treaty with the Cherokees, allowed by the Secretary of War, $94,407.38, making a grand total of $1,357,745.92. (H. Rep. 288, 27th Cong., *supra*, pp 2–3; House Report 1098, p. 68.)

The above grand total is the amount stated in the findings of the court as paid to John and Lewis Ross for the removal of the main body of the Cherokees in 1838 (Record, p. 90). After the removal of the Eastern Cherokees bitter controversies arose between them and the Western Cherokees or Old Settlers as to the occupancy of and title to the lands in the West and the right of government of the nation, resulting in scenes of disorder of the gravest character. Out of this condition grew the treaty of August 6, 1846 (9 Stat. L., 871), the preamble of which declared:

> Whereas serious difficulties have for a considerable time past existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it is desirable should be speedily settled, so that peace and harmony may be restored among them; and whereas certain claims exist on the part of the Cherokee Nation and portions of the Cherokee people against the United States: Therefore, with a view to the final and amicable settlement of the claims before men-

tioned, it is mutually agreed by the several parties to this convention as follows:

The first article provides that the lands occupied by the Cherokee Nation shall be secured to the whole people and a patent shall be issued to them by the United States.

The second article adjusts all difficulties in dispute and declares for a general amnesty to be issued, etc.

The third article provides that the Cherokees shall be reimbursed for certain charges which have been improperly made by the United States against the treaty fund of $5,000,000.

The fourth article provides for the equitable interests of the Western Cherokees in the lands ceded by the treaty of 1828, and how the value of the said interest shall be ascertained, as follows:

> Now, in order to ascertain the value of that interest it is agreed that the following principle shall be adopted, viz, of the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to $5,600,000 (which investments and expenditures are enumerated in the fifteenth article of the treaty of 1855), to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would under such marshaling of accounts be left for per capita distribution among the Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and

> then allow to the Old Settlers (the Western Cherokees) a sum equal to one-third part of such residuum to be distributed per capita to each individual to such part of the Old Settlers, or Western Cherokees. It is further agreed that, so far as the Western Cherokees are concerned, in assessing the expense of removal and subsistence of the Eastern Cherokees to be charged to the aggregate fund of $5,600,000, above mentioned, the sums for removal and subsistence stipulated in the eighth article of the treaty of 1835, as commutation money in those cases in which the members entitled to it removed themselves, shall be adopted. (See 27 C. Cls. R., 47, and 148 U. S., 475.)

By the ninth article of this treaty the United States agrees to make a fair and just settlement of all moneys due to the Cherokee Nation under the treaty of 1835, "which said settlement shall exhibit all money properly expended under said treaty and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, etc."

The eleventh article of this treaty provided for the submission to the United States Senate of the question of whether the amount expended by the United States for one year's subsistence of the Eastern Cherokees after their removal to the Indian Territory should be borne by the Indians and charged to the treaty fund. In pursuance of this submission the Senate decided that such cost should not be borne by the Indians nor charged to the treaty fund, and the amount thereof was reimbursed to the Indians.

It was also proposed in the twelfth article of the treaty to likewise submit to the decision of the Senate the question of whether the expense of the removal of the Eastern Cherokees was to be borne by the Government or by the Indians, but this article of the treaty was rejected by the Senate. (9 Stats., 877.)

Under the fourth article of the treaty of 1846 the accounting officers of the United States made and prepared for settlement the account for the Western Cherokees provided for therein. In stating this account there was charged against the treaty fund of $5,600,000 for removal and subsistence of 18,026 Indians, at $53.33⅓ per head (being $20 for removal and $33.33⅓ for subsistence), the sum of $961,386.66. As thus stated the account showed a balance of $1,571,346.55, and, pursuant to the provisions of said section, the amount found due the Western Cherokees was a sum equal to one-third of said residuum, or $523,448.85. (R., p. 97.)

Shortly after this the Senate of the United States, acting as umpire under Article II of the treaty of 1846, on September 5, 1850, passed the following resolution:

> *Resolved by the Senate of the United States,* That the Cherokee Nation of Indians are entitled to the sum of one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents for subsistence, being the difference between the amount allowed by the act of June 12, 1838, and the

amount actually paid and expended by the United States, and which excess was improperly charged to the treaty fund in the report of the accounting officers of the Treasury.

Resolved, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid.

This amount was accordingly appropriated by Congress for that purpose by the act of September 30, 1850, with the proviso that interest be paid on the same at the rate of 5 per cent per annum, according to a resolution of the Senate of the 5th of September, 1850 (9 Stat. L., p. 556). (R., p. 97.)

Subsequent to the passage of this resolution the accounting officers of the United States, under the ninth article of 1846, made and prepared for settlement the account for the Eastern Cherokees, provided for by that article. In stating this account the total amount expended for removal and subsistence, being $2,823,192.93, was charged against the aggregate of the treaty fund of $5,600,000 and the additional appropriation of $1,047,067, amounting to $6,647,067, as directed in said section nine. But this charge was reduced by crediting the Indians in said statement with the sum of $189,151.24, appropriated pursuant to the resolution of the Senate of September 5, 1850, above cited. Upon this statement there was found a balance due the Eastern Cherokees of $914,026.13.

Appropriation was made by Congress for the payment of the amounts thus found due to the Western Cherokees and the Eastern Cherokees, respectively, as follows:

[Act of September 30, 1850 (9 Stats. L., 523, 556).]

To the "old settlers" or "Western Cherokees," in full of all demands, under the provisions of the treaty of sixth August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, five hundred and thirty-two thousand eight hundred and ninety-six dollars and ninety cents; and that interest be allowed and paid upon the above sums due respectively to the Cherokees and "old settlers," in pursuance of the above-mentioned award of the Senate, under the reference contained in the said eleventh article of the treaty of sixth August, eighteen hundred and forty-six: *Provided*, That in no case shall any money hereby appropriated be paid to any agent of said Indians, or to any other person or persons than the Indian or Indians to whom it is due: *Provided also*, That the Indians who shall receive the said money shall first respectively sign a receipt or release, acknowledging the same to be in full of all demands under the fourth article of said treaty.

[Act of February 27, 1851 (9 Stat. L., 570, 572).]

For payment to the Cherokee Nation the sum of seven hundred and twenty-four thousand six hundred and three dollars and thirty-seven cents, and interest on the above sum at the rate of five per centum per annum, from

twelfth day of June, eighteen hundred and thirty-eight, until paid, shall be paid to them out of any money in the Treasury not otherwise appropriated; but no interest shall be paid after the first of April, eighteen hundred and fifty-one, if any portion of the money is then left undrawn by the said Cherokees: *Provided, however*, That the sum now appropriated shall be in full satisfaction and a final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States, under any treaty heretofore made with the Cherokees. And the said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by any treaty to pay to said Cherokee Nation, and except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees: *And provided further*, That the money appropriated in this item shall be paid in strict conformity with the treaty with said Indians of sixth August, eighteen hundred and forty-six.

Before the payment of the amounts thus found due in said accounts the Western Cherokees, on September 22, 1851, made a separate protest against the proposed settlement with them (Old Settlers case, 27 C. Cls., 9); and on the 27th of November, 1851, the Cherokee National Council protested against both

the accounts, one ground of the protest being that a part of the cost of the removal of the Indians was charged to the original $5,000,000 treaty fund in the account with the Eastern Cherokees.

Thereafter said balance of $914,026.13, with interest at 5 per cent from June 12, 1838, was duly paid and distributed to and among the Eastern Cherokees *per capita* and the individual Eastern Cherokees executed and delivered to the United States a full and final discharge of all claims and demands whatsoever on the United States, as required by the statute making the appropriations.

This discharge was in the form following:

> We the undersigned emigrant or Eastern Cherokees, do hereby acknowledge to have received from John Drennan, Superintendent Indian Affairs, the sums opposite our names, respectively, being in full of all demands under the treaty of sixth of August, eighteen hundred and forty-six, according to the principles established in the ninth article thereof, and appropriated by Congress per act 30th of September, 1850, and per act 27th of February, 1851, which reads as follows:
>
> "And the said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by treaty to pay to said Cherokee Nation,

> and except also such money and lands, if any, as the United States may hold in trust for said Cherokees."

And thereafter the said balance of $532,782.18, with interest at 5 per cent from June 12, 1838, was appropriated by Congress and was duly paid and distributed to and among the Western Cherokees *per capita*, and the individual Western Cherokees executed and delivered to the United States a discharge in the following form:

> We, the undersigned "Old Settlers" or Western Cherokees, do hereby acknowledge to have received from John Drennan, Supt. of Indian Affairs, the sums set opposite our names respectively, being in full of all demands under the provisions of the treaty of the sixth of August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, as per act entitled: "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30th, one thousand eight hundred and fifty-one," approved September 30th, 1850. (R., pp. 99–100.)

Pursuant to the jurisdictional act of Congress of February 29, 1889 (25 Stat., 694), the "Old Settlers," or Western Cherokees, brought suit in the Court of Claims to recover the additional amount claimed by them over and above the amount which they had received in the settlement made with them

pursuant to the fourth article of the treaty of 1846. The substantial basis of this claim was the contention that in that account the cost of subsistence had been charged against the treaty fund of $5,600,000, contrary to the resolution of the Senate September 5, 1850. This claim was allowed by the Court of Claims, and further reductions of the charges against the treaty fund were made by diminishing the number of Indians for whom removal was to be charged and the charge for debts and claims and the cost of the Cherokee committee, with a result that there was found due to the Western Cherokees an additional balance of about $225,000, with interest at 5 per cent from June 12, 1838, pursuant to the resolution of the Senate above referred to.

On appeal to this court the amount of the judgment was reduced about $13,000, but in all other respects it was affirmed (27 C. Cls., 1; 148 U. S., 427).

On the 19th of December, 1891, a treaty was negotiated between the Cherokee Nation and the Commissioners appointed by the President for the cession to the United States of the Cherokee Outlet, in consideration of the sum of $8,600,000 in round numbers and various agreements, the fourth being—

> The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828,

> 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right, within twelve months, to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in, said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting. (R., pp. 103–104.)

The treaty was duly ratified and it went into effect by the act of Congress of March 3, 1893 (27 Stat. L.,

640). The Commissioner of Indian Affairs, in a report to the Secretary of the Interior on February 6, 1892, made the following comment upon this agreement for an accounting in the treaty:

> Particular attention is called to section 4 of article 2 of the agreement, with request for a full report as to what may be the state of the account between the United States and the Cherokees, if practicable, within a reasonable time; if not, your general conclusions.
>
> In reply to this indorsement I have the honor to say that if this section is construed to require the United States to state an account of moneys stipulated to be paid to the Cherokee Nation under the treaties therein specified and under the various appropriation acts to carry the same into effect, this account could be prepared by this Office within a reasonable time, say, about two months. If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant, and in the draft of a bill

> for the ratification of the agreement, herewith inclosed, I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose. (R., p. 105.)

The act of March 3, 1893, ratifying said agreement for the purchase of the "Cherokee Outlet" also provided as follows:

> The sum of five thousand dollars, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article 2 of said agreement.

Thereafter James A. Slade and Joseph T. Bender were employed as experts under the provisions of said section of said act, and they made and rendered an account pursuant to the provisions of paragraph 4 of article 2 of the articles of agreement of December 19, 1891, as ratified and affirmed by said act of March 3, 1893. Said account was by the Secretary of the Interior referred to the Commissioner of Indian Affairs for examination and report, and the same having been examined and approved by said Commissioner, was by the latter returned to the Secretary of the Interior, who transmitted the same to the Cherokee Nation by delivering a copy thereof

to R. F. Wyley, its properly constituted agent for receiving the same, and said account so made, rendered, and transmitted was accepted by the Cherokee Nation by an act of its national council approved December 1, 1894, and no suit was thereafter brought by the Cherokee Nation against the United States charging that said account was in anywise incorrect or unjust, but, on the contrary, the principal chief of the Cherokee Nation, as required by the act of its national council above referred to, did notify the Secretary of the Interior of the acceptance by said nation of said account as so stated by Messrs. Slade and Bender, and did request said Secretary of the Interior to notify the Congress of the United States of such acceptance, and on the 7th of January, 1895, the Secretary of the Interior reported the entire matter to the Congress in the following words:

> SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3, 1893 (27 Stats., 643), a certified copy of 'a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835–36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect,' prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified

copy of an act of Cherokee national council accepting such accounting.

The SPEAKER OF THE HOUSE OF REPRESENTATIVES. (R., pp. 107.)

The Slade and Bender account above referred to appears in Executive Document No. 182, Fifty-third Congress, third session. In stating this account the accountants considered the treaty of New Echota, the appropriation statute of June 12, 1838, and the treaty of 1846, and reached the conclusion that the cost of removal of the Cherokees was an expense to be borne wholly by the United States, and pursuant to this conclusion, stated the account as to this item as follows:

> Upon the assumption that the United States was to pay the expense of removal, there is due the Cherokee fund the sum of $1,111,284.70.

In the appropriation act of March 2, 1895, the Attorney-General of the United States was directed to review and report upon the conclusions of law contained in the Slade and Bender report, and on December 2, 1895, that officer made the report requested. It contains the following statement relative to the claim here at issue:

> The chief item in the schedule of amounts found due from the Government to the Cherokee Nation is the amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to the treaty fund, $1,111,284.70. After careful consider-

ation I am unable to concur in the conclusion of the Department of the Interior as to this item.

After the receipt of this report from the Attorney-General no further action was taken by Congress upon the Slade and Bender report.

ASSIGNMENTS OF ERROR.

The following assignments of error are relied upon on this appeal:

1. The court erred in adjudging that the Cherokee Nation recover from the United States the sum of $1,111,284.70, being part of the cost of the removal of the Eastern Cherokees to the Indian Territory charged against the treaty fund of $5,000,000 of the treaty of New Echota.

2. The court erred in adjudging that the Cherokee Nation recover from the United States interest at 5 per cent upon the sum of $1,111,284.70, from June 12, 1838, to the date of payment, or any interest whatever upon said sum or any part thereof.

ARGUMENT.

The Slade and Bender Account.

The first matter for consideration in discussing this claim is the legal effect and binding force of the accounting or report made by the accountants Slade and Bender, appointed pursuant to the agreement for such accounting in the treaty of 1893.

There was a great diversity of opinion on this score in the Court of Claims.

In the opinion of the court written by the chief justice, this accounting of Slade and Bender, declared upon in the petition of the Cherokee Nation as an award, or at least an account stated and solely relied upon therein, is characterized as lacking in every element of an award and having no semblance to an account stated. The reasoning upon which this conclusion is based is so complete and unanswerable that the court is here referred to the same with great confidence. (Rec., pp. 48, 49.) One associate justice concurring and another dissenting agreed absolutely with this conclusion, whilst the fourth associate justice, also concurring, declined to express any opinion upon the subject. And yet this same accounting, so devoid of inherent standing in court, was made the sole basis of a judgment in favor of the claimants by the chief justice and one associate, without any attempt to inquire into the legal status of the claim. Indeed,

the chief justice was constrained to state that, strictly speaking, it had no legal status, using the following language:

> For if the proposed suit of the Cherokees was to be decided *strictissimi juris*, i. e., upon technical defenses, it had already been decided against them. (Rec., p. 49.)

The learned chief justice here had in mind the decision in the case of the Court of Claims in the case of *Western Cherokees* v. *The United States* (27 C. Cls., 46, affirmed by this court in 148 U. S., 427). Again, upon the question of interest, involving the enormous sum of $3,700,000, more than three times the amount of the principal, and respecting which a separate ground of defense had been urged on behalf of the United States—two of the justices of the Court of Claims adopt, without a word of discussion of that contention, the casual finding in the Slade and Bender accounting upon this item, whilst the third member of the majority, after stating with approval the reasoning of the counsel for the United States on this question, reluctantly yielded the point to his associates against his better judgment. So that as to three-fourths of the vast judgment recovered by the claimants the decision was virtually rendered by an equally divided court.

The arguments advanced for attaching this peculiar sanctity to the Slade and Bender account are: First, that just such an account was contemplated by the agreement in the treaty of

1893, pursuant to which it was stated, and therefore it constituted a part of the consideration for the cession of the Cherokee outlet in that treaty. Practically the same argument is also presented thus: That if the accountants, Slade and Bender, had stated the account as it really was—that is to say, as it appeared upon the books of the United States, and not as they conceived that it ought to have been kept by the United States—it would have been apples of Sodom to the Cherokees, since the result could only have been that the Cherokees in contesting that account in the Court of Claims would "come into court to be immediately turned out under previous decisions." (Rec., p. 50.) As to this latter contention it would seem to be enough to reply in passing that, however untrammeled by its former decisions and by a previous formal compromise and settlement of this very claim by the Cherokees, the Court of Claims might have felt itself to be, if this claim had come before it by reason of a proper statement of the account pursuant to the agreement in the treaty of 1893—nevertheless Slade and Bender, being merely accountants, without a vestige of the power of arbitrators, had no authority whatever to arrogate to themselves this high prerogative; that, laymen as they were, it was their simple duty to take the account as they found it, and especially to obey the law governing this claim as it had been expressly laid down two years before in the case of the Western Cherokees.

The extent of the legal and equitable jurisdiction assumed by Slade and Bender is to be seen from the fact that their conclusion that the sum of $1,111,284.70, part of cost of removal of the Eastern Cherokees, had been improperly charged to the treaty fund involved, first, a construction of the treaty of 1835 and the supplementary treaty of 1836; second, a construction of the agreement between the Cherokee Nation and General Scott in 1838; third, a construction of the treaty of 1846; fourth, a determination as to the legal effect of a final settlement in 1852, with receipts in full for all claims against the United States, including this claim.

The settlement above mentioned was alone absolutely conclusive upon these accountants. True a very similar settlement was pleaded by the United States in ~~behalf~~ bar of the claim in the case of the *Old Settlers* v. *The United States*, and the general sufficiency of the plea was acknowledged both in the Court of Claims and in this court, but it was ~~so held~~ overruled because the special jurisdictional act under which that case was brought disclosed the fact that Congress was convinced that a mistake had probably been made in the accounting in a matter which the Indians from the first had called attention to and desired to have it remedied, "and that the jurisdictional act passed in effectuation of such intention left it open to the courts to readjust the amount, notwithstanding the claim might have been theretofore settled." (148 U. S., pp. 475–476.)

Thus at the time that Slade and Bender went back of this settlement of 1852 it had been pointed out by this court that that was a matter for the courts, and then only by virtue of a special jurisdictional act. But Slade and Bender "cared for none of these things" and did not even refer to either settlement or receipts.

The second argument is: That the statement of the account of Slade and Bender being in favor of the Cherokees, they were thereby precluded from contesting it and having this claim adjudicated in the Court of Claims, as provided for in the agreement, and thus lost a substantial right, so that in the present action the United States should be held estopped to dispute the validity of their account.

These arguments will be considered in their order.

The Slade and Bender report was not such an accounting as was contemplated by the treaty of 1893, and therefore did not bind the United States.

As to the contention that the account to be rendered pursuant to the treaty of 1893 constituted a part of the consideration for the lands ceded to the United States by the Cherokees there is no controversy, but it does not follow, as further urged, that an account in the form that it was rendered by Slade and Bender was the account contemplated; that an account, which in the language of Judge Weldon, should be "a statement of the account founded upon the legal theory of the Cherokee Nation" (Rec., p. 58),

was a part of the consideration of the treaty of 1893. If that were what was intended the agreement could easily, and would have so stated expressly. But in that event it is clear that the agreement could not and would not have contained a provision for challenging the account by the Cherokees through suit in the Court of Claims. For certainly nothing more incongruous and superfluous can be imagined than solemnly to provide the means by which a party might contest a decision in his own favor. But the agreement did contain exactly that provision, the significance of which is not to be overlooked and can not be explained away. And how is that provision to be given force and meaning? The answer seems plain. The accountants were appointed to go over all the treaties named and all the various appropriation statutes passed pursuant or with relation thereto, and thus ascertain the several amounts of money which were to be credited to the Cherokees; then from the books of the United States, the only books of account relating to the subject (Rec., bottom p. 104, top p. 105), they were to ascertain what disbursements and payments had been debited to these various credits by the Government upon its construction of the treaties, and what balance, if any, of those credits remained unpaid. That would have been an accounting—a statement of the account drawn from the books—fulfilling the whole duty of the accountants. And who ever heard before of accountants doing anything more than that, of assuming to state an account, not as shown by the books but according

to their own notions as to what the books ought to have shown? And if those extraordinary accountants, Slade and Bender, instead of airily deciding vexed and perplexing questions of treaty construction in bland ignorement, or more likely ignorance, of an express judicial decision to the contrary; if instead of this exercise of mistaken and ill-advised judicial functions they had rendered their account in the usual and ordinary way, it would have shown in so many words and figures that the sum of $1,111,284.70 had been paid out of the original $5,000,000 consideration of the treaty of 1835 as part of the cost of the removal of the Eastern Cherokees, with the inevitable result of a suit in the Court of Claims by the Cherokee Nation to recover that amount from the United States on the ground that it was an "amount of money promised but withheld by the United States from the Cherokee Nation under said treaty" (Rec., p. 103). Thus would the whole agreement have been made effective. And it was because those accountants failed to perform this plain and simple duty that the Cherokees lost the right under that agreement to have the precise question that is now before this court decided by the Court of Claims in 1895 instead of ten years later. To that extent the Cherokee Nation has undoubtedly suffered through the fault of these agents of the United States and through the equally unauthorized ratification of their report by the Secretary of the Interior, if his transmission of the account to Congress is to be so construed. But the blame can be extended no further; for when this remarkable

accounting, big with its "conclusions of law," reached Congress that body immediately asked the opinion of the Attorney-General respecting those conclusions of law, and the Attorney-General at the first opportunity advised Congress that the conclusion of law in the report as to the item of the cost of removal was erroneous. By this time, however, the twelve months within which the Cherokee Nation had the right to contest the account had lapsed, and thus the agreement for the accounting had in effect been rendered a nullity.

The question of estoppel.

In view of the foregoing facts it is difficult to perceive the merit of the contention that the United States is estopped from disputing the binding force of the Slade and Bender account because the Cherokees lost their right to sue the United States under the agreement of 1893, in a suit expressly authorized by the United States to restore that right.

Further consideration of the various opinions delivered in the court below on this subject.

"The one thing that is certainly assured to the nation [through the agreement for an account], and the only thing, is that the account will be the portal through which the Cherokee Nation can carry the rights and the wrongs of its people into a judicial forum." (Opinion of the Court, Rec., p. 47.) If this accurately states the situation, then it follows that there was no agreement that the account should be

stated according to the theory of the Cherokees, for the account could only be the portal through which the Cherokee Nation could enter court, by being stated as it appeared on the books of the United States—that is to say, contrary to the theory of the Cherokee Nation. True, the court goes on to say that the Cherokee Nation must then come into court only to be immediately turned out under previous decisions (Rec., p. 50). If this is so it is because such is the law of the case, because the treaties under which it is asserted do not support the claim. But after all, even though the agreement for an accounting be deemed to carry with it no other assurance than that the Indians were to have their legal rights upon the question of the cost of removal under the treaties of 1835 and 1846 judicially and finally determined in the Court of Claims and this court, nevertheless the agreement is not therefore necessarily a vain thing, for the question had not as yet been judicially determined in a suit wherein the Eastern Cherokees were a party, and hence was not as to them *res adjudicata*. Moreover, the very question is now an open one before this court, with the opinion of one of the judges of the Court of Claims in favor of the contention of the Cherokees. Then, too, it is asserted in the opinion of the court that under the agreement, if this claim had come before the Court of Claims in 1895, the court would have been warranted in disregarding the strict law of the case (rec., p. 49). Indeed, two members of the court

have done precisely that in the present case. Thus from every point of view it would seem that it was left to the Court of Claims and to this court to decide whether or not this claim of the Cherokees should be tested as other claims against the United States are judicially determined—according to the law of the case, and that no such unusual equity jurisdiction was conferred by the agreement upon two lay accountants. All that can be said in favor of the Slade and Bender account is that no mistake was made by the accountants upon the legal theory which they adopted as the basis of the liability of the defendants. (Opinion of Weldon, J., p. 59.) But the United States objects, not to the mathematics of the Slade and Bender account, but to its usurpation of judicial functions.

In the same opinion the United States is held accountable for the failure of the Secretary of the Interior to express the dissatisfaction of the United States with the Slade and Bender report (rec., p. 60). There is, however, nothing in the agreement of the treaty under which these accountants were appointed clothing the Secretary of the Interior with any such authority in the premises. The authority to act upon the report rested under that agreement with Congress alone, and the only relation to it of the Secretary of the Interior was a purely ministerial one.

DISSENTING OPINION OF JUDGE WRIGHT.

The various arguments made in support of the Slade and Bender account are briefly but thoroughly

disposed of in the following quotations from the dissenting opinion of Wright, J.:

> It is not strictly accurate to say that the $1,111,284.70 of the Slade and Bender account is part consideration for the sale of the Outlet, for that item had no existence until Slade and Bender made an account that was never in the records.
>
> The stipulation relative to the existing dispute about the subject of removals was part of the agreement for such sale, and to that extent may be treated as entering into the inducement or consideration for such sale, but the rights of the parties created by the contract could not be enlarged nor abridged without the consent of both, by the agents of either while assuming to carry out the provisions of the agreement.
>
> All that was contemplated by the fourth subdivision of article 2 of the agreement of December 19, 1891, was a statement of the account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835, 1836, 1846, 1866, and 1868, and any laws passed by the Congress for the purpose of carrying said treaties, or any of them, into effect. Upon such accounting being made the Cherokee Nation was given the right within twelve months to enter suit in this court, not for any moneys appearing to be due upon the accounting, but for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation under any of the treaties or laws which

might be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting; or, if it should be found upon said accounting that any sum of money had been so withheld, the amount should be duly appropriated by Congress.

What manifestly was intended by the agreement was that the United States was to state, first, the moneys due to the Cherokee Nation under the treaties specified and the laws passed to carry them into effect, and, second, the disposition in fact made of such moneys—not what ought to have been done, but what was done. In other words, the account should state the various sums so appropriated, so that it would appear in a precise and compact form how much money was due the Cherokee Nation under the treaties and laws mentioned and the disbursements thereof in fact made by the United States.

This was the view taken by the Interior Department, before Congress ratified the treaty, in the report of the Commissioner of Indian Affairs, communicated to Congress, and upon which was made the appropriation of March, 1893, of $5,000 to employ such expert persons to properly render a complete account to the Cherokee Nation of moneys due, as required in the fourth subdivision of article 2 of the agreement. The report upon which the Congress acted in making such appropriation in effect stated that it seemed the intention of the parties to the agreement that what was required was a detailed statement of all the moneys received and disbursements made by the United States

of the Cherokee funds under treaties and acts of Congress, and that being true it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century, and to prepare a statement of that kind it would require an appropriation of at least $5,000 to pay for the services of an expert accountant and assistants, and in the draft of the bill for the ratification of the agreement for the purchase of the Outlet the appropriation was provided for as recommended, thus proving by the act of ratification itself that Congress intended to require in such accounting only "a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress." Nothing was intimated or stated that the accountants were authorized to do more than to review and copy the accounts and records running back nearly a century. No authority was given to change the accounts, but to copy them.

The defendants agreed to inform the Cherokee Nation how much money was due to them under the various treaties and laws, and how much, for what purpose, and in what manner it had been paid out, thus forming a basis for the nation to come into this court and bring suit, not merely for a sum or balance appearing to be due on the face of such account, but to dispute the account, allege and declare an amount of money promised and withheld, or, in other words, that the United States had diverted or

misappropriated an alleged amount, and upon such allegation this court was given jurisdiction to decide and give its judgment.

Slade and Bender, the accountants, mistook their authority, however, and usurped the jurisdiction conferred upon this court and decided the questions intended for this court. They did not merely state the facts of the account as they existed, but changed the facts and undertook to state the account as they thought it ought to have been made. Their account was not the account of the defendants but the account they believed the defendants should have made instead. They substituted a different account for the one they were authorized to state.

It has been argued that the Secretary of the Interior by transmitting the Slade and Bender account to the Cherokee Nation thereby ratified and gave it effect. This can not be, for the plain reason that he was not the agent of the United States for such a purpose. The only authority conferred upon that officer was to employ such expert person or persons to properly render a complete account as required in the fourth subdivision of article 2 of the agreement.

It ought to require no argument to prove that beyond a mere statement of the existence of the accounts as in fact kept by the Government, a true exhibit thereof, the accounting of Slade and Bender is of no effect whatever. By their attempt to enter upon the jurisdiction so manifestly intended for this court they misled the Cherokee Nation and thwarted the inten-

> tion of the parties to obtain an early adjudication of the matters now before the court. As soon as this report was called to the attention of Congress it was repudiated, and the matter was again referred to this court in the form now existing, and the case is wholly unaffected by the report of Slade and Bender, except in so far as it exhibits the true state of the account, the record of the facts and acts of the Government, as they actually occurred at the respective times of the various transactions.

CONCURRING OPINION OF JUDGE PEELE.

To the foregoing arguments against the binding force of the Slade and Bender account should be added the following extract from the concurring opinion of Peele, J.:

> What, then, was referred to the court for adjudication? It is conceded in the court's opinion that the amount found due has none of the elements of an award nor of an account stated, but that as the rendition of the account was made a part of the consideration for the sale of the Cherokee Outlet it is binding on the United States, and therefore the court can not go behind the account so rendered. That Congress did not take that view of the account is evident from their passage of the two acts conferring upon the court jurisdiction "to examine, consider, and adjudicate * * * any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States." The agreement of 1891, ratified by the Congress, respecting the

rendition of an account, is that "The United States shall, without delay, render to the Cherokee Nation * * * a complete account of moneys due the Cherokee Nation under any of the treaties" therein referred to, and if the Cherokee council should "determine that such accounting is incorrect or unjust," the Cherokee Nation should then have the right, within twelve months, to enter suit in the Court of Claims against the United States. This it did not do, but instead accepted the account and thereby waived its right to sue. But were the United States bound to accept the account, based as it was upon the *assumption* of their liability under the several treaties? I think not, for the reason that the questions of law involved were not submitted to the experts for their decision by the appropriation authorizing their appointment, nor will the language of the agreement made the basis thereof bear such construction. The accounting contemplated by the agreement and for which the experts were appointed was a statement of the account as it actually existed between the United States and the Cherokee Nation—that is to say, to properly state the several claims of the Cherokee Nation and the payments made thereon by the United States. This they did not do, but upon the *assumption* of the liability of the United States to pay the cost of removal, stated a different account and the result was the balance of $1,111,284.70 in favor of the Cherokee Nation, so that in my view of the case that question was left open by the experts for the court to

> deal with; but inasmuch as the Cherokee Nation accepted the account, though rendered upon the assumption of the liability of the United States, instead of bringing suit in the Court of Claims to have that question determined, it was left for the Congress to deal with, and hence the reference of the claim to this court. The jurisdiction of the court to determine that question is not controverted.

Finally, the language of the jurisdictional act under which this action was brought in the Court of Claims precludes any idea of a claim based upon the Slade and Bender report. It reads:

> Jurisdiction is hereby conferred upon the Court of Claims to *examine*, *consider*, and *adjudicate*, with the right of appeal to the Supreme Court of the United States, * * * any claim which the Cherokee tribe, or any band thereof, *arising under treaty stipulation*, may have against the United States.

Rightly interpreting the scope and purpose of this statute, Judge Peelle, instead of holding himself bound by the Slade and Bender report, made examination into the treaties and statutes discussed and interpreted in that report with a view to determining the claim as *arising under treaty stipulation*, and as a result decided that the conclusions of law in the Slade and Bender report were correct. Judge Wright, approaching the subject in the same way, reached the opposite conclusion.

THE TREATIES AND APPROPRIATION STATUTES OUT OF WHICH THE CLAIM HERE UNDER CONSIDERATION IS ALLEGED TO HAVE ARISEN.

THE TREATY OF NEW ECHOTA.

The treaty of New Echota was entered into on the 29th of December, 1835, but on March 1, 1836, five supplementary articles were added to it, and thereafter the treaty as thus completed was ratified and adopted as one instrument, on May 23, 1836. The claim which is the subject of this appeal had its origin in the apparent, though not necessarily actual, conflict between articles 8 and 15 of the treaty of 1835, in that, whilst article 8 recites that the United States agree and stipulate to remove the Cherokees to their new homes, section 15 provides for a distribution per capita amongst the Indians of the balance of the treaty fund after deducting the amount which should be actually expended for various enumerated items referred to in the preceding articles of the treaty, including removal.

It is impossible, of course, to reconcile these two articles on the theory of the claimants that by article 8 it was intended to provide that the United States should not only remove the Cherokees, but bear the cost of such removal; but upon the theory that by article 8 it was simply provided that the United States should supervise, and supply the means of, the removal by furnishing a sufficient number of steamboats and baggage wagons to remove the Indians comfortably, as specified in said article,

whilst by article 15 the cost of the same was to be borne by the Indians, the two articles become harmonious and effect is given to both. In any event if the two articles can not be reconciled, then, to quote the language of the opinion of Judge Peelle, "If the ordinary rules of construction applicable to contracts between individuals are enforced, it must be conceded that the cost of removal was properly chargeable to the treaty fund" (Rec., p. 63). That is to say, the fifteenth article, being the later one, must control. It must be conceded, however, that this apparent conflict between these two articles of the treaty gave color to the contention on the part of the Indians that the cost of removal had not been properly taken into consideration in fixing the treaty fund at $5,000,000, and that therefore further provision should be made for the same. A similar contention was also made by them respecting certain claims of individual Indians against citizens of the United States. This contention so impressed the President that before the treaty was completed he referred the same to the Senate, with the statement that since the Cherokee people had supposed that the sum of $5,000,000 fixed by the Senate in their resolution of the —— day of March, 1835, as the value of the Cherokee land and possessions east of the Mississippi River was not intended to include the amount which might be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, it was his desire that the

Senate consider the same, and if it was not intended by the Senate that this sum of $5,000,000 should include those objects, in that case such further provision should be made therefor as might appear to the Senate to be just.

At the same time there was pending before the Senate, by the provisions of article 1, the question as to whether the original treaty fund covered claims for spoliations, and it had also been determined by the President that no preemptions nor reservations should be allowed, as provided for in the treaty. The result of all this was the agreement to five supplementary articles to the treaty. The first article related to preemptions, rights, and reservations, declaring them void; the second article recited the question regarding claims and the cost of removal which had been referred to them by the President, and the third article made provision for all these items as follows:

> ARTICLE 3. It is therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people to include the expense of their removal, and all claims of every nature and description against the Government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and preemptions and of the sum of three hundred thousand dollars for spoliations described in the first article of the above-mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed

agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund.

Thereafter, as already stated, the original treaty, together with the supplementary articles, was ratified as one treaty, which treaty made full provision for the payment of every item to which the Indians were entitled and provided a treaty fund of $5,600,000 for that purpose. (27 C. Cl., pp. 40 and 43.) This treaty, so far as it defined the liability of the United States to the Indians for the cost of removal, spoliations, claims against the United States not otherwise provided for in the treaty, and in lieu of reservations and preemptions originally provided for in the treaty, bound the United States to pay to the Indians the sum of $600,000, to be applied to those purposes, the surplus, if any, to be turned over and belong to the education fund. On the other hand, it equally bound the Cherokees to accept that sum as the consideration for those items. This agreement no more bound the United States to pay any further sum for the purposes enumerated than the original treaty bound the United States to pay more than $5,000,000 for the purposes therein enumerated. It can no more be spelled out of the supplementary articles to the treaty that the United States was liable for a greater amount than $600,000 in the event that the total cost of removal, claims, spoliations, reservations, and preemptions enumer-

ated in article 3 should aggregate more than $600,000, than that they were obligated to pay more than $5,000,000 to the Indians, in case the aggregate of the cost of improvements, ferries, and subsistence, together with the $1,000,000 to be devoted to a permanent trust fund and to payment for additional land in the West, should exceed $5,000,000. And yet it is precisely upon this theory that this claim is asserted, the argument being that the effect of the supplementary articles 2 and 3 is an agreement upon the part of the United States to pay the total cost of removal, whatever it might be. But this necessarily rests upon pure inference, since the express language of those articles conveys no such meaning; yet nothing would have been easier than to recite such an obligation, if it had been so intended, by stating, in so many words, that the United States agrees to pay the whole expense of the removal of the Cherokee people; and the fact that the supplementary articles studiously refrained from any such recital is the strongest evidence that it was not so intended. The fact is that supplementary article 3 was, as it turned out, an agreement founded upon a mistaken idea of the situation. This is evident from the fact that it makes provision for the disposal of the *surplus* after applying the $600,000 to the cost of removal and to the payment of claims and for spoliations and in lieu of reservations and preemptions. It was an agreement, nevertheless, binding the United States to pay the $600,000 and the

Indians to accept the same for the purposes enumerated. But it is argued, on behalf of the claimant, and such is the view taken in the concurring opinion of Judge Peelle (Rec., p. 64), that the supplementary articles necessarily operated to modify article 15, by eliminating therefrom the word "removal," thereby harmonizing that article with article 8. But this by no means follows. To begin with, it is significant that the question before the Senate when the supplementary articles were agreed upon was not as to the meaning of the language of the treaty itself, but only as to whether the Senate intended in their resolution of March, 1835, to include in the sum of $5,000,000 the cost of removal of the Indians, and, as above pointed out, no reference is made in supplementary article 3 to the provisions of article 15 of the treaty. Hence that article remains in force. As a practical matter, to be sure, it was supposed that it would not be put in force as to the cost of removal, since it was supposed that supplementary article 3 made ample provision for that purpose. But the complete agreement on the subject of removal, of the treaty as finally ratified, was clearly this:

By article 16, that the Cherokees should remove to their new homes within two years from the ratification of the treaty. This, by the way, was the very essence of the whole treaty, the prime purpose of which was to rid the States wherein the Indians were then residing from their presence, troublesome and distracting to the whites and to themselves, and to provide them a suitable and permanent home in the

far West. By article 8 the United States were to supervise this removal and take care that it be done in a proper manner. By supplementary article 3 the cost of the removal was to be paid out of the fund of $600,000 therein provided for. And by article 15, left absolutely intact in the treaty, any further cost of removal over and above this $600,000 was to be deducted from the $5,000,000 fund.

Thus viewed, each and every one of the articles of the treaty above enumerated is made effectual according to its fair and reasonable intendment.

And in any event, if only the $600,000 fund was made available for the cost of removal and since by the treaty the Cherokees agreed unqualifiedly to remove, it is clear that they must pay the further cost of that removal after the only fund provided for the purpose by the treaty was exhausted.

THE ADDITIONAL APPROPRIATION OF 1838.

As the appropriation act of June 12, 1838, is relied upon as a legislative construction of the treaty of New Echota favorable to the contention of the claimants upon the question of cost of removal, a discussion of the same here becomes necessary. Notwithstanding the Indians were required by the provisions of article 16 of the treaty to remove within two years, only a small minority did so, but the cost of the removal and subsistence of that minority, together with the other expenditures chargeable thereto, nearly exhausted the $600,000 allowed by the third supplementary article. At this

juncture the Secretary of War recommended that the Cherokee Nation be allowed, as had been requested by it, to take charge of their own emigration, and that application for such further sum as might be required to defray the expense should be made to Congress. Thereupon the House of Representatives passed a resolution asking for a statement of the amount that would be required for this purpose, and on May 25, 1838, the Secretary of War submitted an estimate of what it would cost the United States to remove and subsist the Cherokees, as proposed. This estimate was as follows:

The payment of expenses of removing the remaining Cherokees, estimated at 15,840, at $30 a head	$475,200	
Amount applicable to that purpose	39,300	
Balance to be provided for		435,900
If it should be deemed proper to make any further provision for the payment of the subsistence of the emigrants for one year after their arrival in the West, it will require, estimating the whole number at 18,335, thereby including those who have already emigrated, and allowing the amount stipulated to be paid by treaty, namely, $33.33 a head		611,167
Total		1,047,067

(H. R. Ex. Doc. No. 182, Fifty-third Congress, third session, p. 10.)

On June 12, 1838, Congress appropriated the full amount thus estimated, as follows:

> SEC. 2. *Be it further enacted*, That the further sum of one million forty-seven thousand

> and sixty-seven dollars be appropriated, out of any money in the Treasury not otherwise appropriated, in full for all objects specified in the third article of the supplemental articles of the treaty of 1835 between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal west: *Provided*, That no part of said sum of money shall be deducted from the five million dollars stipulated to be paid to said tribe by said treaty: *And provided further*, That said Indians shall receive no benefit from said appropriation unless they shall complete their emigration within such time as the President shall deem reasonable, and without coercion on the part of the Government.

Much significance is sought to be attached to the above provision that no part of this appropriation was to be deducted from the $5,000,000 treaty fund, the argument of Judge Peelle in this connection being: "If not to be so deducted, then it certainly follows that the United States were to pay the cost of such removal and subsistence, not a part of it, but the whole of it."

On the contrary, it would seem impossible to make anything more of this appropriation than a gratuity, an act of grace on the part of the United States, done with a generosity which is fittingly dwelt upon in the case of the *Eastern Band of Cherokees* v. *The United*

States and the Cherokee Nation (20 C. Cls., 467), where the court say:

> To carry out that policy [of removal from the States] immense sums of money, millions of dollars not promised by treaties, have been appropriated by Congress, and paid in the spirit of unbounded liberality, yielding to the demands of the Indians in almost every case, perhaps in every case without exception, and paying in one way and another to an extent more than twice as much as they agreed to pay by the terms of treaties, as is shown by the numerous appropriation acts scattered throughout the Statutes at Large.

And as for the above proviso, it clearly meant nothing more than to give positive assurance that the appropriation was wholly additional to the $5,000,000 fund; and as a matter of fact, it has been so treated. But the act contains another clause which is of undoubted significance, namely, that the appropriation was to be "in full for all objects specified in the third supplemental article of the treaty of 1835," which include the cost of removal. The subsequent acceptance by the Cherokees of the benefits of this fund, with the condition above attached, ought alone to bar them from the assertion of any further claim upon the United States for the cost of their removal, and certainly from *basing* such claim upon this very act.

The views of the commissioners appointed by the President in July, 1846, to inquire into the difficulties then existing among the Cherokees and all

matters in dispute between them and the United States, which commissioners, under a subsequent appointment, negotiated the treaty of 1846, and whose report and conclusions in a great measure formed the basis of that treaty, are very pertinent here. They reported as follows:

> That nothing more was intended to be paid by the United States for the possessions of the Cherokees east of the Mississippi than the sum of $5,000,000 is rendered certain by the letter of General Cass, Secretary of War, dated March 7, 1835, in reply to the delegation headed by John Ross. That delegation, under date of March 6, 1835, inquire of General Cass "whether we are to understand from your communication of this date that the five millions resolved by the Senate should be paid to the Cherokee Indians for all their land and possessions east of the Mississippi River, as embracing also the expenses of transportation and subsistence in removal, and for subsistence for twelve months after their arrival at their new homes; for blankets, guns, etc., or whether that sum is an offer, as really appears from the resolution to be, only for the extinguishment of the Cherokee title to lands east of the Mississippi River, and for the houses and improvements of the Cherokee inhabitants situated thereon, and that the United States will in addition pay the expenses of transportation and subsistence in their removal," etc. To which General Cass replied that "the sum of $5,000,000 which is offered for your claims east of the Mississippi will, as

I have already informed you, *be in full for your entire cession.* The application of it will be such as you desire, a just regard being had to individual rights. *Nothing more will be paid for removal, or for any other purpose or object whatever.* In giving to you the full value of your property the United States comply with all the demands of justice upon them."

Thus, so far, there could be no misunderstanding as to the purposes of the United States in reference to the amount to be paid for the lands of the Cherokees east of the Mississippi nor as to the objects to which it was to be appropriated.

The talk sent by General Jackson to the Cherokee people, under date of March 16, 1835, takes the same view of the subject, and mentions generally the objects to which the money is appropriated. (See House Doc. 286, first session, Twenty-fourth Congress, pp. 41, 42, and 43.)

We have thus shown what was the understanding of the parties in reference to the matter prior to the treaty of 1835. We now come to the treaty, and we find the same understanding substantially recognized although varied in some not essential particulars. In the fifteenth article of that treaty it is expressly acknowledged and agreed that "the amount which shall be actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, debts, and claims upon the Cherokee Nation, and for the additional quantity of lands [the 800,000 acres to be added to the country west

of the Mississippi] and goods for the poorer classes of Cherokees, and the several sums to be invested for the general national funds, provided for in the several articles of this treaty," shall be deducted from the purchase money, and the balance, whatever it may be, shall be divided equally between all the people belonging to the Cherokee Nation east, according to the census then just completed.

An additional sum of $600,000 was added to the $5,000,000 by the third supplemental article of the treaty; and the further sum of $1,047,067, appropriated by the act of June 12, 1838, for removals, subsistence, etc., as before stated, all which constituted one general sum of $6,647,067, upon which the sums expended for the objects recapitulated in the fifteenth article of the treaty were chargeable.

It is now argued by the counsel for the western portion of the Cherokee people, including the Ross and treaty parties, that inasmuch as the sum of $1,047,067, appropriated by the act of June 12, 1838, was given by Congress for removal and subsistence, the United States thereby assumed those two items of expenditure, and of course relieved the five million fund from any charge for those two objects.

To put an end forever to that argument, the undersigned copy from the report of Judge White, Senate document 466, second session, Twenty-fifth Congress, before referred to, the following extract:

"They believe the $5,000,000, given by the treaty, as the difference in value between

the countries exchanged, and the $600,000 before mentioned, allowed for spoliations, and as a fund for removal, constitute a very liberal consideration on the part of the Federal Government; yet the committee would feel much better satisfied that too much should be done for the Cherokees than too little. If, therefore, the voluntary grant of an additional sum of money can be made a means of *hastening* their removal to their new homes, of dispensing with the use of a large military force, and of insuring confidence in the justice of the Government, and of restoring harmony and good feelings, they believe economy, humanity, and peace will be best consulted by making such grant.

"With a view to attain these objects, the committee would respectfully recommend to the Senate that, in the passing of some appropriation bill still to be acted on, an item be inserted placing a reasonable sum of money at the disposal of the Executive."

Thus it appears that the large appropriation of $1,047,067 was a "*voluntary grant*," made for the purpose of hastening the removal of the Indians, of dispensing with the large military force employed in that country, and restoring harmony and good feelings between all parties, and not for the purpose contended for by the counsel.

The expenditures specified in the fifteenth article are, therefore, justly chargeable upon the treaty fund.

THE REMOVAL OF THE CHEROKEES FOLLOWING UPON THE APPROPRIATION ACT OF JUNE 12, 1838.

The following history of the removal of the Eastern Cherokees by the Cherokee Nation itself, through what is known as the *Ross contract*, is, despite its length, absolutely essential to a full understanding of the situation following upon the appropriation statute of June 12, 1838.

The Cherokee Indians having been collected into camps and contracts having been entered into with sundry firms for the subsistence and removal of the Indians to the West, General Scott, on July 23, 1838, was approached by a delegation of the Cherokee Nation, numbering eight and headed by John Ross, an influential member and principal chief of the tribe, bringing to General Scott a resolution which had been adopted by the national council of the Cherokees, which read as follows:

> *Resolved by the national committee in council of the people of the Cherokee Nation in general council assembled*, That it is the decided sense and desire of the general council that the whole business of the emigration of our people shall be undertaken by the nation, and that delegates are hereby advised to negotiate the necessary arrangements with the commanding general for that purpose.

A letter signed by these delegates informed General Scott that, pursuant to such resolutions, the Cherokee Nation was willing to undertake the whole business of removing the people of the tribe to the west of the Mississippi River. (Report No. 288, *supra*.) There-

upon, on July 25, 1838, General Scott replied, in substance, that on the part of the United States he was ready to place the whole business of completing the emigration of the Cherokee people to their new homes west of the Mississippi River in the hands of such functionaries of the Eastern Cherokees as should possess due authority to undertake and carry through the emigration. The letter concludes with the following sentence:

> The foregoing conditions being agreed to, the United States, through me, are willing to stipulate to pay over to the Cherokee functionaries, from time to time, such portion of the moneys appropriated for the emigration as may seem reasonable to prepare for and carry it out.

On July 27, 1838, the delegates notified General Scott by letter that they had full authority to close the necessary arrangements for the entire removal and subsistence of the Cherokees, and were prepared to do so. (Report No. 288, p. 6.)

On the 28th of July General Scott pronounced the credentials of the delegates satisfactory, and authorized them to take charge of the business and to make estimates of necessary expenses, and agreed to honor such estimates, if reasonable.

On the 31st of July the Cherokee delegates submitted an estimate of expenses, which amounted to $65.88 *per capita*.

On August 1, 1838, General Scott wrote to the delegates that their estimate was extravagant, and

discussed the matter at some length. In conclusion he stated:

> The whole expense of the emigration is to be paid out of the appropriations already made by Congress, the general surplus of which is to go to the Cherokee Nation in various forms. Therefore they have a direct general interest in conducting the removal as economically as comfort will permit.

On August 2, 1838, the delegates addressed General Scott, adhering to their estimates, with a slight increase for soap. On the same day General Scott wrote to the delegates, yielding to their estimates and demands, and again admonishing the Cherokee Nation in the following language:

> As the Cherokee people are exclusively interested in the cost as well as the comfort of the removal, I do not feel myself at liberty to withhold my sanction. The estimate, therefore, submitted to me on the 31st ultimo, with a small addition for soap, is hereby approved.

This increase brought the proposed cost of removal up to $66.24 per capita. (Rep. No. 288, p. 2.)

General Scott entered into these negotiations by express instructions from the Secretary of War, who, by letter, authorized him to enter into an agreement with the agents of the nation for the removal of their people, etc. It will thus be seen that there was a deliberate contract entered into between the Cherokee Nation, acting through its

appointed delegates, and the United States, acting through its appointed agent, for the removal of these Cherokees, and that in the contract thus made the Cherokees were distinctly informed that the cost of such removal was to be charged to the Indians and deducted from their funds. There can be no doubt that the Cherokees understood this fact, and entered into the agreement with the full knowledge that the cost of removal was to be borne by them and not by the United States.

Take, for instance, the memorial or protest of a large committee of Cherokees against awarding this contract to John Ross. This protest is dated August 20, 1838, and is contained in Report No. 1098, Twenty-seventh Congress, second session, pages 31–36. Extracts from this protest are as follows:

> Among the arguments, as we learn, which Mr. Ross used to shew the propriety of investing him with absolute power, he insisted that the late contract promoted a large individual speculation: that, under his guidance, he would save in the expenditures for supplies at least one hundred thousand dollars *to the nation*. Instead of this, we think his present contract has added largely to the expense to be incurred, etc. * * *
>
> We contend that the contract ought to have been let out to the lowest bidder; that the nation, as well as those who have already emigrated as those who are present, are under the protection of a solemn treaty

against every abuse of power, and that that protection is wisely confided to the United States; that although the chief representation of the power of the United States may have deemed it fit and proper and most expedient to confer certain powers upon Mr. John Ross, yet that *no abuse and improper expenditure of the money belonging to the nation* can justly be permitted to be made by Mr. Ross in violation of the treaty. * * * Hence, the duty of protection on the part of the United States is of a twofold character—that the objects designed may be attained by the Government, and that the Cherokees may have full justice done to them, and the *largest possible sum saved for their use and benefit*.

Again, on page 33, the memorialists say:

Against the contract, therefore, which Mr. John Ross has made, which is at variance with all his professions and deeply injurious to the nation, and against the mode in which it was made, for the supply of the Indians on their route to Arkansas, we, the undersigned committee of the Cherokee Nation, duly recognized under the treaty, which is the supreme law of the land, do enter our solemn protest; "and we do appeal to you, as the official organ of the United States, for the immediate redress of this great and grievous wrong." We insist, as of right, that the contract should be let out by public advertisement, by the proper disbursing officer of the United States, to the lowest bidder at as

> short notice as you may deem expedient. We pledge ourselves that there are individuals now upon this ground, of the first respectability in point of character and property, who will take the contract at a much less sum, and by which one hundred thousand dollars will be saved to the Cherokee Nation. And we also pledge ourselves that they will be forthwith prepared with supplies, without the delay of a single day.

Again, on page 35:

> If we now made an appeal to you for anything in favor of ourselves, personally, as an exclusive privilege, we should expect rejection. But we make an appeal against a stupendous individual speculation upon the funds of the nation, and we appeal to you for a voluntary right of emigration, upon equal terms with all other modes, and as the official power of the nation, recognized by the treaty and by the Government of the United States. We now repeat our solemn protest against the existing contract by Mr. Ross with his brother as a wanton expenditure of the money of our nation.

From this protest it is plain that the Cherokee people fully realized that the amount paid for their removal was to be charged to them, and hence were interested in having it done as economically as possible. General Scott transmitted this protest to the delegates with whom he had made the contract, and speaks of it as involving perhaps $400,000 of the money of the Chero-

kees, and in concluding his letter he says, in substance, that it is inconceivable that the delegates of the Cherokee Nation had deliberately squandered $180,000 of their nation's money. (Pp. 37–38.)

When Ross presented his bill for $486,939.50, in addition to the $776,398.98 that had previously been paid him for the removal expenses, the bill was authorized to be collected by the Cherokee Nation for the benefit of the Cherokee Nation, and to that end the Cherokee Nation employed counsel to press the claim and collect it. This gentleman's name was M. St. Clair Clarke, and with the permission of the Secretary of War he addressed certain interrogatories to General Scott, one of which was as follows:

> Interrogatory VIII. Did you or not at any time understand from John Ross and others that there was to be a settlement by the emigrating committee and the nation, and that the *actual cost of emigration was to be the cost charged to the nation?*

To this interrogatory General Scott answers:

> I did.
>
> (Rep. No. 288, pp. 33–35.)

General Scott further states (p. 38):

> Under this head I must say that the understanding of the parties was common and distinct, that the eighty days for the movement of each detachment by land was a mere assumption of a basis on which to calculate for the moment the advances to be

made by the United States on account of the movement, and to set it a going. If the advances proved to be too great, the excess was to be paid into the treasury of the nation; if too little, on account of more time in the movement, the United States were to *make up the difference from the trust fund.* This understanding is distinctly stated in my letter to J. Ross, November 14, 1838. Until late in the season it was not doubted that the detachments, one with another, would make the movement in the time estimated—eighty days. * * *

I know not how to account for the fact that so many doubtful and extravagant charges should be made by the Rosses against the *funds of their nation*, unless it be to augment the profits of Lewis, and perhaps of John; or perhaps, again, to increase (by disgorging) the *per capita* of *their party, to the prejudice of the treaty party* of the same nation.

Whether those party dissensions have been healed, and the signers and friends of the treaty are now fully represented in the national council, I know not, having no information from that people in the last three years. I observe, however, among the papers before me, belonging to the War Department, one that purports to be a copy of a long preamble, with resolutions annexed, passed by the two branches of the Cherokee national council, which audits and sustains, in the fullest manner, the two items above, and to the precise aggregate amount claimed, $581,346.88½.

If this document be genuine, and has emanated from the government of the nation, it would seem to be a sufficient voucher on which to make the payment. Whether the minority or treaty-making party, whose *per capita* may be materially lessened by the excess of the charges, have consented to those resolutions, I know not.

When this claim was considered by the Secretary of War, he said (pp. 27, 28, and 29):

A claim was preferred by the representatives of the Cherokee people, to whom had been intrusted the direction of their removal to the west, under an arrangement with Maj. Gen. Winfield Scott, in the summer of 1838. * * *

The sum now demanded amounts to $486,939.50. *It is alleged to be payable out of the balance of the Cherokee fund created by the treaty of 1835 and the law of 1838*, to the representative or agent of the Cherokee people, in trust for such of them as have rendered services or furnished means of transportation or subsistence to those who removed, under the direction of their chief, John Ross, in 1838 and 1839. The construction which has heretofore prevailed limited the time (for the purpose of settling the compensation) within which the emigration was to be performed to eighty days, and the sum to be paid to $65.88 for each individual removed. This, it was conceived, was deducible from the correspondence between Gen. W. Scott and the Cherokee del-

egation in 1838, whose arrangements, by letter, were considered to be a contract for a specific sum, at which Mr. Ross and his associates were bound to remove their brethren to the western territory. The claimants, on the other hand, contend that the estimate, which was finally acceded to by General Scott in August, 1838, was nothing more than an exhibit of the daily cost of transporting and subsisting each individual, which was regarded as fixed; but that the time assumed in the estimate was not binding on either party, but was to be subsequently ascertained by actual experiments, and the measure of compensation to be settled in the particular of time by the fact, as it should turn out, whether the number of days consumed in the emigration should be more or fewer than eighty. * * *

I think the ground on which the claim rests is materially varied by the recent statement of General Scott. Since the first decision was made, General Scott, in his answers to Mr. Clarke's interrogatories, states: "The march of the several Indian detachments was averaged, by estimate, at eighty days; and on that estimate, money was *advanced* to Mr. John Ross. If that estimate was found too great, Mr. Ross *was to refund to the nation;* and if too small, including the unavoidable delays mentioned above, it was understood and agreed that the subsistence, etc., for the excess of time on the road, was to be paid for by the Government *out of the funds of the Cherokees.*" And again: "The

time of the actual removal (the commencement) on this side of the Mississippi of each detachment was to be marked by Captain Page, and the arrival of the detachment on the other side of the Mississippi by Government agents there. Of course the final settlement of the expenses of the removal was left for its termination." In the "notes" submitted by General Scott, in June last, he is perhaps stronger to the same effect: "*The understanding of the parties was common* and distinct, that the eighty days allowed for the removal of each detachment, by land, was a mere assumption of a basis on which to calculate, for the moment, the advances to be made by the United States on account of the movement, and to set it agoing. *If the advances proved to be too great, the excess was to be paid into the treasury of the nation; if too little, on account of more time in the movement, the United States were to make up the difference from the trust fund.*"

The Secretary of War then quotes the authorization of the Cherokee Nation to John Ross to collect this money as follows:

In addition: "The Cherokee Nation, through their national committee and council, in national council assembled," ordered, "That the aforesaid John Ross be, and he is hereby, directed and fully empowered to proceed to Washington City, and to urge a settlement of this claim with all possible expedition, and to apply for and receive from the Government of the United States, *in the*

> *name of the Cherokee Nation*, the balance due of five hundred and eighty-one thousand three hundred and forty-six dollars and eighty-eight and one-half cents, as stated in his account of the emigration claim, in order that the business growing out of it may be brought to a final close." * * *
>
> The strongest argument that can be urged in its favor, and the one that chiefly influences my mind, is the resolution of the Cherokee council of November 11, 1840. It has been their pleasure, in the most solemn form in which their legislative power can be exercised, to say what disposition shall be made of this *their own money;* and I know of no objection to the allowance of what they have thus sanctioned.

It was therefore paid to John Ross, at the order of the Cherokee Nation, as a part of the funds of the Cherokee Nation, and if the authorities of the United States had had the remotest idea that the sum so paid was to be borne by the United States and not by the Indian fund, it is safe to assert that no payment would ever have been made.

The evidence is abundant to warrant the oft-repeated protest of General Scott that $66.24 *per capita* was a most extravagant estimate for the removal of these Cherokees. Section 8 of the treaty of 1835 fixed the cost at $20 per head, and that was the amount allowed to the two thousand and odd Cherokees who voluntarily removed. The estimate on which the act of June 12, 1838,

appropriating $1,047,067 was based, was $30 *per capita*. J. C. Watson & Co., in the spring of 1838, offered to contract at $32 *per capita*. Gerry Hinant stated before the Congressional committee, who investigated this matter, that he was a citizen of the Cherokee Nation, and removed himself; that he was fifty-five days on the route; that he moved at his ease, stopping when necessary for rest and refreshment; and that his expenses, after starting, were less than $20 per head. The distance was 800 miles. (Rep. No. 288, p. 1.)

In the protest of a large number of Cherokee people, the following statement occurs:

> We pledge ourselves that there are individuals now upon this ground, of the first respectability in point of character and property, who will take the contract at a much less sum, and by which $100,000 will be saved to the Cherokee Nation. And we also pledge ourselves that they will be forthwith prepared with supplies without delay of a single day. (Report No. 1098, Twenty-seventh Congress, second session, pp. 31-36.)

In addition to the foregoing, the following observations upon the John Ross contract seem pertinent and fully justified by the facts:

At the time that the proposition to remove the Eastern Cherokees was made by John Ross on behalf of the Cherokee Nation they had notice that the amount available for that purpose, which was composed of the balance left of the $600,000 appropri-

ation and the additional amount appropriated for removal in the appropriation act of June 12, 1838, was $475,200, while the estimated number of remaining Cherokees to be removed was 15,840 (R., p. 19). The price per capita for removal under the Ross proposition was $66.24 (Rep. No. 288, p. 2). Hence the proposition contemplated the expenditure of $1,049,200, in round numbers, for removal, or $575,000 more than the amount available for the purposes of removal outside of the $5,000,000 fund. Now, when it is considered in addition, that before the proposition was accepted General Scott distinctly admonished the delegates of the Cherokee Nation presenting the proposition that the Cherokee people were exclusively interested in the cost of removal and that they had a direct general interest in conducting the removal as economically as comfort would permit, it seems too clear for argument that the Cherokees understood at the time that the cost of removal would necessarily trench upon the $5,000,000 fund; and it is equally clear that it was only because of this clear understanding on the part of the Cherokees that the Secretary of War, through General Scott, consented to a proposition which in any other view of the situation would, on the face of it, result in a cost to the United States of over half a million dollars.

Indeed it is simply incredible that the Secretary of War, having at his disposal through the appropriation act of June 12, 1838, the full amount of

his own estimate of the cost of removal of the remaining Cherokees, would have approved the proposition of the Cherokee Nation to effect the removal at a cost of more than twice that sum, if the intent of that proposition had been that the United States were to bear the extra cost of removal thus proposed. In other words, that he would deliberately agree to involve the United States in a proposed expenditure of $575,000 by consenting to a contract for the removal of the Indians at a price $36.24 per capita more than his own estimate of the proper cost of the same, and without any attempt to test the accuracy of that estimate by resorting to other contractors. Indeed the corroboration of the substantial correctness of the estimate of the Secretary of War was then before him in the offer of Watson and Company to effect the removal at $32 per head. The only reasonable explanation of the acceptance by the Secretary of War of the Ross proposition is that it was with the distinct understanding that the extra cost of removal thus incurred should be borne by the Cherokee Nation. While the explanation of the willingness of the Cherokees to incur such extra cost is to be found in the fact that by directing their own removal they could do so according to their own ideas, and in the further very significant fact that the whole sum paid for the cost of removal would thus go to themselves.

The treaty of 1846.

After the removal of the Eastern Cherokees had begun, but before their arrival in the Indian Territory, they adopted a declaration of rights through their national committee and council and people in general council assembled, in which they declared the inherent sovereignty of the Cherokee Nation, together with the constitution, laws, and usages of the same, to be in full force and virtue, and should continue in perpetuity. Upon their arrival in the Indian Territory they refused to submit to the government of the Western Cherokees, but at the same time offered to unite in a general council or convention which should frame a constitution and establish a government for all. The Western Cherokees refused to enter into this arrangement and declared and maintained that the Eastern Cherokees had entered their territory without their permission, and that their status or character was that of immigrants or aliens, subject to the established constitution and laws then and theretofore existing in the Territory. The Eastern Cherokees refused to concede this and retained their autonomy, and made laws and exercised all the powers and functions of government. They likewise treated the act of signing the treaty of 1835 and 1836 by individual Cherokees as a treasonable act to the Cherokees, and they enacted decrees of outlawry against the Eastern Cherokees

who had signed the treaties and enforced these decrees. They also maintained their authority throughout the Cherokee country by military force, both against the members of the treaty party and all the Western Cherokees who did not submit to and recognize their government. The consequence was that between the years 1836 and 1846 the Cherokee country was the scene of disorders of the gravest character, destroying the rights and liberty of the people and endangering the peace of the frontier. The Western Cherokees appealed at different times both to the President and to Congress for help and protection and the recognition of their rights under the treaties of 1828 and 1833, and they duly and at all times declared and maintained that they were the true and exclusive owners of the land ceded by these treaties, and their government the only government *de jure* in the Cherokee country, and that it should be recognized by the United States.

Under these conditions the United States treated with the Eastern Cherokees, the Western Cherokees, and that portion of the Eastern Cherokees known as the treaty party, on August 6, 1846 (9 Stats., 871). In the preamble of this treaty it is declared:

> Whereas serious difficulties have for a considerable time past existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it is desirable should be

> speedily settled, so that peace and harmony may be restored among them; and whereas certain claims exist on the part of the Cherokee Nation and portions of the Cherokee people against the United States: Therefore, with a view to the final and amicable settlement of the claims before mentioned, it is mutually agreed by the several parties to this convention as follows:

The first article provides that the lands occupied by the Cherokee Nation shall be secured to the whole people and a patent shall be issued to them by the United States.

The second article adjusts all difficulties in dispute and declares for a general amnesty to be issued, etc.

The third article provides that the Cherokees shall be reimbursed for certain charges which have been made by the United States improperly against the treaty fund of $5,000,000.

The fourth article provides for the equitable interests of the Western Cherokees in the lands ceded by the treaty of 1828, and how the value of the said interest shall be ascertained, as follows:

> Now, in order to ascertain the value of that interest it is agreed that the following principle shall be adopted, viz, of the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to $5,600,000 (which investments and expenditures are enumerated in the fifteenth

article of the treaty of 1855), to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would under such marshaling of accounts be left for per capita distribution among the Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (the Western Cherokees) a sum equal to one-third part of such residuum to be distributed per capita to each individual to such part of the Old Settlers or Western Cherokees. It is further agreed that so far as the Western Cherokees are concerned in assessing the expense of removal and subsistence of the Eastern Cherokees to be charged to the aggregate fund of $5,600,000, above mentioned, the sums for removal and subsistence stipulated in the eighth article of the treaty of 1835, as commutation money in those cases in which the members entitled to it removed themselves, shall be adopted.

That is to say, the sums of $20 and $33.33 per capita.

By the ninth article of this treaty the United States agrees to make a fair and just settlement of all moneys due to the Cherokee Nation under the treaty of 1835, "which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, etc."

The eleventh article of this treaty provides for the submission to the United States Senate of the question of whether the amount expended by the United States for one year's subsistence of the Eastern Cherokees after their removal to the Indian Territory should be borne by the Indians and charged to the treaty fund. In pursuance of this submission to the Senate, the Senate decided that such cost should not be borne by the Indians or charged to the treaty fund, and the amount thereof was reimbursed to the Indians.

It was also proposed in the twelfth article of the treaty to likewise submit to the decision of the Senate the question of whether the expense of the removal of the Eastern Cherokees was to be borne by the Government or by the Indians, but this article of the treaty was rejected by the United States.

This treaty of 1846, entered into for the deliberate purpose of making all of the Cherokees parties to the treaty of 1835, which up to that time had been repudiated by a large majority of the Cherokees as binding only upon the minority by whom it was negotiated, called the "treaty party," and to amicably and finally settle certain claims of the Cherokee Nation and portions of the Cherokee people against the United States, would seem to have deliberately set at rest all possible question regarding the present claim of the Cherokees. And this obvious construction of the treaty

becomes more evident upon close examination. For instance, article 3 deals directly with the question of claims of the Cherokees, recited in the preamble, specifies certain such claims as just, being founded upon improper charges against the $5,000,000 fund, and proceeds to make provision for their reimbursement by the United States. No claim for cost of removal is referred to in this article, and upon familiar principles of construction, this enumeration is by exclusion alone sufficient to dispose of this claim. But again, by article 11, two open questions not determined by the treaty are left to the United States Senate for its decision. The first of these is whether the amount expended for the one year's subsistence of the Eastern Cherokees after their arrival in the West was properly chargeable to the treaty fund; and the other is whether the Cherokee Nation should be allowed interest on whatever sum might be found due the Nation (on the settlement provided for in article 9) and from what date and at what rate per annum. Here the exclusion of the question of the cost of removal is still more deliberate, for the items of removal and subsistence are coupled together in article 8 and article 15 of the treaty, being thus clearly placed upon the same footing, and yet by article 11 of the treaty of 1846 we find question raised in the treaty only as to the cost of subsistence. The irresistible conclusion is that the question of the cost of

removal was deemed at rest. This conclusion finds the plainest confirmation in the action taken with reference to the proposed article 12. This proposed article recited that the Western Cherokees asserted that the expenses incurred for removal and subsistence of the Cherokees after May 23, 1838, should not be charged upon the $5,000,000 fund, nor upon the fund provided by the third article of the supplement thereto, in the settlement provided for them in the treaty of 1846, and therefore they propose "that the question shall be submitted with this treaty to the decision of the Senate of the United States, of what portion, if any, of the expenditures made for removal, subsistence, and spoliations, under the treaty of 1835 is properly and legally chargeable to the five-million fund." This article was struck out by the Senate. And the treaty with this proposed article thus eliminated was ratified without dissent by the Cherokees.

Here, then, we find that during the negotiation of the treaty of 1846 the assertion that no part of the cost of removal should be charged to the $5,000,000 treaty fund was made by the western Cherokees alone, and that the Senate refused to entertain the general question of the cost of removal in any form.

Finally, we have a practical repetition in article 9 of this treaty of the provisions of article 15 of the treaty of New Echota, by providing

for a settlement with the Cherokees in order to ascertain the per capita division to be made pursuant to the treaty of 1835, which per capita division finds mention only in article 15 of that treaty. To this end it provides for a deduction from the grand total of the original $5,000,000 fund, the $600,000 added thereto by the third supplementary article, and the additional amount of $1,047,067 appropriated in 1838—$6,647,067—of the expenditures for practically the same items respecting which similar provision is made in said article 15. This enumeration includes removal. Article 4 also refers explicitly to this enumeration of the same article 15.

Thus we see that not only is the claim for the cost of removal omitted entirely from a treaty entered into for the express purpose of disposing of *all of the claims* of the Cherokees against the United States, but that the Senate refused to permit the question to be raised at all, and that express provision is made for charging the cost of removal against the total of the fund belonging to the Cherokees. This seems to leave no room for discussion, yet counsel for claimants profess to see a floating straw which they may grasp, by urging that this enumeration in article 9 of the charges to be made against the funds of the Cherokees is qualified with portentous significance by the preceding recital that "said settlement shall exhibit all money properly expended under said treaty"

(of 1835). Upon this word *properly* there is balanced the argument that the proper application of the word limits the charge of the cost of removal to the $1,647,067 provided for by the 3d supplementary article of the treaty of New Echota, and the appropriation act of 1838. But this is a mere begging of the question. Certainly the article recognizes by its enumeration that the cost of removal is one of the proper charges comprised in the preceding general phrase, and this without qualification; whilst, instead of providing that various charges are to be subtracted from separate funds, as, for instance, the cost of spoliations from the $600,000 fund, it is directed that the total of the expenditures shall be taken from the total of the funds. Of course there might be other charges not included in the enumeration which would be proper charges, but that would have to be clearly shown in making the settlement. One charge that was determined by the Court of Claims and this court in the Old Settlers case to be an *improper* charge was the expenses of the Cherokee committee. (148 U. S., 478.)

SUBSISTENCE AND REMOVAL.

It is urged that "subsistence" and "removal" should stand upon the same footing, and that the decision of the Senate upon the subject of subsistence ought also to control as to removal. This contention would seem to be completely disposed of by the action of the Senate in considering a

claim for subsistence in Article 11 and utterly refusing to consider any claim for removal by striking out Article 12. If any further proof were needed that the two claims do not stand upon the same footing, it is to be found in the action of the committee having under consideration the proposition to make a further appropriation for subsistence under Article 11 of the treaty of 1846, which was as follows, as is recited by this court of the United States in the case of *United States* v. *Old Settlers* (148 U. S., at p. 452):

> The committee gave their reasons for the first resolution at length. They stated that they entertained no doubt but that by a strict construction of the treaty of 1835 the expense of a year's subsistence of the Indians after their removal west was a proper charge upon the treaty fund, but they set forth a variety of considerations which justified the conclusion that the expense for subsistence was to be borne by the United States, including certain action by the Secretary of War in 1838, and the language of the act of June 12, 1838, making the appropriation of $1,047,067. By the latter, Congress provided that no part of the $600,000, or of the $1,047,067, should be taken from the treaty fund. The $1,047,067 was, said the committee, "made auxiliary to the $600,000 provided for in the third supplemental article—a fund provided for removal and other expenditures independent of the treaty, and in full for these objects. But as respects *subsistence* it was *in aid* of the *expense*

for that purpose, a discharge *pro tanto* of the obligation of the Government to subsist them, and *not final satisfaction as in the case of removal.*

Thus it will be seen that the action of the Senate in deciding that the expense for subsistence was to be borne by the United States was partly inspired by generosity toward the Indians, but in no sense resulted because the United States was bound thereto by the treaty of 1835. In other words, it was a concession made because of the plain exigencies of the situation; for by this time the cost of removal to be borne by the Indians had proven to be a burden too heavy to admit of any further additions to it for the cost of subsistence. As a matter of fact, the cost of both removal and subsistence had turned out to be enormously greater than estimated, the cost of subsistence being $1,457,000, and of removal $1,495,000, in round numbers. Both these expenses were strictly chargeable to the Cherokees, but the United States generously assumed the cost of subsistence.

THE SETTLEMENTS PROVIDED FOR IN ARTICLES 4 AND 9 OF THE TREATY OF 1846.

In 1850 the accounting officers of the United States appointed for the purpose prepared for settlement the account with the Western Cherokees provided for in article 4 of the treaty of 1846. In obedience to the provisions of article 4 the

computation of the cost of removal and subsistence was made on the basis of $20 per head for removal and $33.33⅓ per head for subsistence, amounting to $961,386.66, and the fund from which the total of the various expenditures was deducted was, pursuant to the same article, $5,600,000. This basis of computation left a residuum contemplated by the same article of $1,571,346.55, and in further compliance with said article the share belonging to the Western Cherokees was computed at an amount equal to one-third of this balance, or $523,148.85. Thereafter the account for settlement with the Cherokee Nation provided for in article 9 of the treaty was prepared by the same accounting officers. In preparing this account these accountants, pursuant to said article 9, charged to the grand total of $6,647,067 specified in that article for removal and subsistence the sum of $2,823,192.93, but this was partially offset by an appropriation made September 30, 1850, of $189,151.24 for subsistence, pursuant to the resolution of the Senate acting as umpire under article 11 of the treaty of 1846, on September 5, 1850, that the Cherokee Nation were entitled to this sum as an excess of the cost of subsistence improperly charged to the treaty fund.

Thus computed, the balance for distribution to the Eastern Cherokees was found to be $914,026.13. Appropriations were made by Congress to pay the amounts thus found due, with interest at 5 per cent per annum from June 12, 1838, pursuant to

the resolution of the Senate of September 5, 1850—for the Western Cherokees by the act of September 30, 1850 (9 Stat. L., 523–556); and for the Cherokee Nation, to be paid to the Eastern Cherokees, by the act of February 27, 1851 (9 Stat. L., 570–572).

The first statute contained the provision—

> That the Indians who shall receive the said money shall first respectively sign a receipt or release acknowledging the same to be in full of all demands under the fourth article of the said treaty.

The later statute contained the provision:

> That the sum now appropriated shall be in full satisfaction and a final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States, under any treaty heretofore made with the Cherokees. And the said Cherokee Nation shall, on the payment of said sum of money, execute and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by any treaty to pay to said Cherokee Nation, and except, also, such moneys and lands, if any, as the United States may hold in trust for said Cherokees: *And provided further*, That the money appropriated in this item shall be paid in strict conformity with the treaty with said Indians of sixth August, eighteen hundred and forty-six.

Prior to the payment of the sums thus appropriated by them, the Western Cherokees and the Cherokee Nation protested against these settlements as insufficient; the Western Cherokees chiefly on the ground that they had been charged with the cost of subsistence contrary to the resolution of the Senate above referred to. One of the grounds of the protest of the Cherokee Nation was that the treaty fund of $5,000,000 had been charged with a part of the cost of removal—the same claim that is asserted in this action. Subsequently, in 1852, the distribution of the amounts appropriated by Congress to pay the sums found due in these accounts was made per capita among the Western and Eastern Cherokees, respectively, and receipts were given by the Indians for the same as follows:

By the Eastern Cherokees:

> We, the undersigned emigrant or Eastern Cherokees, do hereby acknowledge to have received from John Drennan, Superintendent Indian Affairs, the sums opposite our names, respectively, being in full of all demands under the treaty of sixth of August, eighteen hundred and forty-six, according to the principles established in the ninth article thereof, and appropriated by Congress per act 30th of September, 1850, and per act 27th of February, 1851, which reads as follows:
>
> "And the said Cherokee Nation shall, on the payment of said sum of money, execute

and deliver to the United States a full and final discharge for all claims and demands whatsoever on the United States, except for such annuities in money or specific articles of property as the United States may be bound by treaty to pay to said Cherokee Nation, and except also such money and lands, if any, as the United States may hold in trust for said Cherokees."

By the Western Cherokees:

> We, the undersigned "old settlers" or Western Cherokees, do hereby acknowledge to have received from John Drennan, Supt. of Indian Affairs, the sum set opposite our names, respectively, being in full of all demands under the provisions of the treaty of the sixth of August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, as per act entitled: "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30th, one thousand eight hundred and fifty-one," approved September 30th, 1850.

At the time of this distribution and the giving of these receipts no protest of any sort was made by any of the Cherokees.

Thus the treaty of 1846 was followed by solemn settlements between the Cherokees and the United States made pursuant to that treaty, and accompanied by receipts in full from the Cherokees, which

covered the claim here sued upon. As between ordinary parties, of course, those settlements would be conclusive. Similar settlements with the United States have also been held conclusive upon the Indians in the cases of the *United States* v. *Adams* (7 Wall., 463) and *The United States* v. *Childs* (12 Wall., 232). In the latter case Mr. Justice Miller said, on page 243:

> We lay out of view in this case, as in the Adams case, the receipts which they gave, under protest, in order to regain possession of their vouchers. But we can not disregard the finding of the Court of Claims that, after Congress had appropriated money to pay the sums found due by the commissioners, the claimants received the amount so allowed, and signed upon each voucher a receipt whereby they acknowledged having received said reduced amount "in full of the above account." And that at the time of receiving this payment they made no formal objection or protest, but were required to and did sign the receipt above described.

The United States has in this case no thought of interposing any technical defense of former settlement, but it does not seem unfair to urge that, in view of all the surrounding circumstances, the settlement with the Cherokee Nation and their receipts in full covering this identical claim should be here held conclusive.

It is true that in the case of the Western Cherokees their settlement and accompanying receipts were held not conclusive, both by the Court of Claims and by this court. But this conclusion was reached on the express ground that in the accounting with the Western Cherokees there had been charged against the treaty fund of $5,000,000 the cost of subsistence, in direct opposition to the resolution of the Senate of September 5, 1850, that the cost of subsistence was not properly chargeable to the treaty fund, and upon that point this court said:

> We agree, as was said in the case of *Choctaw Nation* (119 U. S., 1, 29), that where, in professed pursuance of treaties, statutes have conferred valuable benefits upon the Indians, "which the latter have accepted, they partake of the nature of agreements—the acceptance of the benefit, coupled with the condition, implying an assent on the part of the recipient to the condition, unless that implication is rebutted by other and sufficient circumstances." And it is also true that when a party, without force or intimidation, and with a full knowledge of all the facts in the case, accepts, on account of an unliquidated and controverted demand, a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, he will not be permitted to avoid his act on the ground of duress. (*United States* v. *Child*, 12 Wall., 232, 244.)

But we think, under all the circumstances disclosed here, that Congress being convinced that a mistake had probably been made in the accounting in a matter which the Indians from the first had called attention to, and desirous, as being the stronger party to the controversy, that that superior justice which looks only to the substance and the right should be done in the premises, voluntarily waived any reliance upon lapse of time or laches, and, after attempts on its own part to arrive at a satisfactory result, determined to obtain a juridical interpretation of the treaties and laws bearing upon the subject, and to be found by judicial decision in respect of the conclusions flowing therefrom, and arrived at upon equitable principles; and that the jurisdictional act passed in effectuation of such intention left it open to the courts to readjust the amount notwithstanding the claim might have been theretofore settled. In other words, if the adjustment and settlement were found to have been made upon an erroneous interpretation, which led to an obvious mistake, then Congress designed that the mistake should be corrected. We therefore proceed to examine the account in question in accordance with what we believe to have been the intention of Congress in the passage of this act.

In the present case no such situation obtains, for in preparing the account for settlement with the Cherokee Nation the accounting officers expressly regarded this resolution of the Senate and

made no charge for subsistence against the treaty fund of $5,600,000. Moreover the jurisdictional statute in the Old Settlers case presented in terms the question "whether or not the said Indians have heretofore adjusted and settled their said claim with the United States" (148 U. S., 469), but the settlement is not so opened up in this case.

THE REPORT OF THE ATTORNEY-GENERAL UPON THE CONCLUSIONS OF LAW IN THE SLADE AND BENDER REPORT.

Reference has heretofore been made in this brief to the letter of the Attorney-General addressed on December 2, 1895, to Congress in response to the direction of Congress contained in the appropriation act of March 2, 1895, that the Attorney-General review and report upon the conclusions of law contained in the account rendered by Slade and Bender pursuant to the treaty of 1893 with the Cherokees. This letter appears in Senate Document No. 16, Fifty-fourth Congress, first session, but for convenience that part of the same which relates to the item of the cost of removal is here presented:

> The chief item in the schedule of amounts found due from the Government to the Cherokee Nation (Report, p. 32) is amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund, $1,111,284.70.
>
> After careful consideration I am unable to concur in the conclusion of the Department of the Interior as to this item.

By the treaty of 1835 the United States agreed to pay the Cherokees $5,000,000 for their lands east of the Mississippi and furnish them other lands to the westward. Supplementary articles were added in 1836, the second of which recites the fact that the Cherokee people supposed that such sum of $5,000,000 was not to include the amount required to remove them, nor certain claims, in which supposition they had been confirmed by the opinions of the War Department and some of the Senators who voted upon the question; that the President was willing that the subject should be referred to the Senate, and if it was not intended by the Senate that the $5,000,000 should include said subjects, then that such further provision should be made therefor as the Senate should think just. The third supplemental article therefore allows the additional sum of $600,000, to include the expense of removal and all claims of every nature and description against the United States not otherwise expressly provided for.

The $600,000 having been exhausted, however, a further provision of $1,047,067 was made June 12, 1838, in full of all the objects specified in the third supplementary article above named, and for the further object of aiding in the subsistence of the Cherokees for one year after their removal, with the proviso that no part of said money shall be deducted from the five millions stipulated to be paid said tribe by said treaty.

The various other objects of the two additional sums above named having reduced them below the amount required to pay the entire expense of removal, the question is whether the remainder was to be charged against the $5,000,000 or to be paid by the United States in addition thereto.

Whatever may be said as to the true construction in this regard of the treaty of 1835, with its supplement, and the subsequent acts of Congress relating thereto, it is certain that there was continual doubt and dispute about it, arising chiefly from the apparent contradiction between article 8, wherein the United States agreed "to remove the Cherokees to their new homes," and article 15, wherein "the amount which shall be actually expended for * * * removal" is mentioned among the items to be deducted from the sum to be paid. This is quite evident from the report of the Department of the Interior; but see also reports of committees, first session Twenty-eighth Congress. (Vol. 2, 1843–44, pp. 7, 17.)

In this situation the natural course was taken. The parties made a new treaty, proclaimed August 17, 1846 (9 Stat. L., p. 871), each appearing by duly constituted representatives, and there being no suggestion from any quarter of the slightest unfairness or misunderstanding.

The purpose of the treaty is clearly set forth in the preamble:

"Whereas serious difficulties have for a considerable time past existed between the

different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it is desirable should be speedily settled, so that peace and harmony may be restored among them; and whereas certain claims exist on the part of the Cherokee Nation and portions of the Cherokee people against the United States: Therefore, with a view to the final and amicable settlement of the difficulties and claims before mentioned, it is mutually agreed by the several parties to this convention as follows, viz:"

There were three distinct classes of Cherokees, one known as the Old Settlers or Western Cherokees, who had removed before the treaty of 1835; another as the "Ross" or antitreaty party, who had opposed that treaty, and a third as "the treaty party," who had favored and finally carried it.

Article 4 of the treaty of 1846 dealt with the claim of the Western Cherokees to an interest in the property east of the Mississippi, notwithstanding their removal, for which they should be paid. The existence of such equitable right was admitted, and in order to ascertain its value it was agreed that—

"All the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to $5,600,000 (which investments and expenditures are particularly

enumerated in the fifteenth article of the treaty of 1835), to be first deducted from said aggregate sum, thus ascertaining the residuum or the amount which would, under such marshaling of accounts, be left for per capita distribution among the Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (or Western Cherokees) a sum equal to one-third part of said residuum, to be distributed per capita to each individual of said party of Old Settlers or Western Cherokees."

It was further agreed that—

"So far as the Western Cherokees are concerned, in estimating the expense of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of $5,600,000 above mentioned, the sums for removal and subsistence stipulated in the eighth article of the treaty of 1835 as commutation money in those cases in which the parties entitled to it removed themselves, shall be adopted."

By article 9:

"The United States agree to make a fair and just settlement of all moneys due to the Cherokees and subject to the per capita division under the treaty of 29th of December, 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence and commutation

therefor, * * * the aggregate of which said several sums shall be deducted from the sum of $6,647,067, and the balance thus found to be due shall be paid over, per capita, in equal amounts, etc."

Article 11 dealt with the contention of the Cherokees that the amount expended for one year's subsistence after the arrival in the West of the Eastern Cherokees was not properly chargeable to the treaty fund, which was submitted to the Senate.

It is clear that the exact question now presented was raised and settled by the parties in that treaty. If confirmation were needed it could be found in article 12 (which the Senate did not approve), wherein the Western Cherokees claimed that in the settlement with them provided in article 4 "the expenses incurred for the removal and subsistence of Cherokees after the 23d day of May, 1838, should not be charged upon the $5,000,000 allowed to the Cherokees for their lands," etc. It will be noted that the date so named was after the expiration of the two years limited in the treaty of 1835 as the period within which removals must be made. The admission is evident that the expense of removals prior to that date was properly chargeable to the fund.

The other provisions of the treaty of 1846, while they do not in terms refer to the present question, strongly confirm the view I have taken, because they were intended to settle all possible questions of dispute, both among the different classes of Cherokees

and between them or any of them and the United States. The treaty contains many mutual considerations and concessions, on account of which it would have been quite natural for the Cherokees to abandon their claims as to expenses of removal, even if it were founded on the better reason. I see no escape from the conclusion that by that treaty they did abandon that claim, and therefore the item above referred to is not properly a debt of the United States.

It will be remembered that the provisions of the treaty of 1846 have been carried out. The matter of the charge for one year's subsistence, which was by article 11 submitted to the Senate and decided by it in favor of the Cherokees, was settled by restoring to the Cherokee fund $189,422.76 which had been charged against it.

The Western Cherokees having, notwithstanding this, been charged with commutation for subsistence under the provisions of article 4, a special act was passed authorizing them to sue in the Court of Claims to recover the amount so charged. They did sue and recovered the amount with interest. (*Old Settlers* v. *United States*, 148 U. S., 427.)

The petition in that case conceded that the charge for removal was proper under the treaty of 1846, but sought to reduce its amount by having it applied only to Cherokees who removed prior to the expiration of the two years named in the treaty of 1835.

I am unable to agree with the suggestion made in the report of the Department of

the Interior (p. 21) that the true construction of article 9 of the treaty of 1846 is that it was intended to make no change whatever in the treaty of 1835. This claim is based chiefly on the use of the word "properly." The United States agreed to make a fair and just settlement of all moneys due the Cherokees under the treaty of 1835, which said settlement shall exhibit all money properly expended under said treaty. If nothing more was intended than a mere reiteration of the obligations of the treaty of 1835, without any attempt to settle its disputed construction, it is difficult to imagine any occasion for the treaty. The language which follows that just quoted removes all doubt, viz, "and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence," etc. Certain purposes for which it was agreed that money had been "properly expended under said treaty" are here recited, and that of removal is one of them.

THE DISSENTING OPINION OF JUDGE WRIGHT.

In his dissenting opinion, Judge Wright sums up the whole question in the following comprehensive language:

> By setting aside the accounting of Slade and Bender as respects the charge for removals, we would be brought to a consideration of the case upon its merits, namely, the liability of the defendants for removals under the stipulations of the treaty of 1835. No subsequent act of Congress changed the

treaty in this respect. The appropriations made for such purpose were, in view of the provisions of the treaty, mere gratuities, and did not bind the defendants to assume further liabilities. Congress might do so if they saw fit, but no legal obligation was assumed in that regard. Plaintiffs are now here claiming under the treaty of 1835, and it is familiar doctrine that they can not at the same time both claim under and repudiate its provisions. That the treaty of 1835, unchanged as it is, charged the expense of the removals to the plaintiffs is too plain for argument, as will appear by reading it within its four corners.

If the conclusion reached by the majority of the court is to be accepted as the final award of the moneys claimed in this suit, it will prove the futility of accomplishing any settlement of disputed matters by the mutual agreement of the parties.

The Report of Senator Quarles.

The attention of the court is also invited to Senate Report, 57th Cong., 2d sess., an adverse report made upon this claim by Senator Quarles, for the Committee on Indian Affairs, on S. No. 5685.

THE OLD SETTLERS' CASE.

As already referred to, in the opinion of the Court of Claims the Chief Justice stated that the proposed suit of the Cherokees against the United States in the treaty of 1893 had already been decided against them, which is equivalent to say-

ing that the present suit, which is nothing more than a reinstatement of that proposed suit, has already been decided against the claimants. In so holding the opinion of the court, in effect, reiterates the decision of the Court of Claims in the case of *Old Settlers or Western Cherokees* against *The United States* (27 Court of Claims, 1), which decision was affirmed by this court in 148 U. S., 427.

The following extracts from the opinion of the court in that case, delivered by Mr. Chief Justice Nott, show that the very question here involved was carefully considered and fully disposed of:

> That treaty [of 1846] was a contract between three parties, the United States, the Eastern and Western Cherokees, which purposes were to make the Eastern and Western Cherokees parties to the treaty of New Echota (the treaty of 1835), which they had never conceded themselves to be, and to secure peace in the Cherokee country * * *.
>
> This fifteenth article is a part of the treaty of 1835 and of the compact between the United States and the Eastern Cherokees. It was not framed to express the compact and agreement between the United States and the Western Cherokees, and is not to be found in the treaty of 1846, except by reference. *As between the United States and the Eastern Cherokees, the rules for the construction of statutes and treaties would require that it should be deemed expressive of the intent of the parties, and that full effect should be given to each of its provisions.* * * *

> The treaty of 1846 regarded the two treaties as one instrument, *and brought together the amount named in both as one treaty fund, but at the same time made this augmented fund subject to an expenditure which was not a part of the consideration given for the lands east of the Mississippi, but ~~which~~ which was the primary and immediate object of the addition of $600,000.*
>
> * * * * *
>
> *As between the United States and the Eastern Cherokees, it would have been proper for Congress to have charged the whole cost of removal to the treaty fund and deducted it from the per capita payments.*

This decision also furnishes a complete answer to the eloquent recital of the story of the wrongs and sufferings of the Cherokee people previous to and during the time of the negotiation of the treaty of 1835 and the alleged frauds practiced upon them in the negotiation of that treaty, which will not unnaturally be made here.

In the Court of Claims the court held that the treaty of 1846 made all of the Cherokees parties to the treaty of 1835, and that this treaty must be regarded in the Supreme Court as a part of the supreme law of the land, which no court in this country, as a court of either law or equity, can declare to have been procured by duress or fraud and treat as inoperative. This court on the appeal of the case sustained that position unqualifiedly. (148 U. S., 468.)

THE QUESTION OF INTEREST.

By adopting as final the Slade and Bender account, the chief justice of the Court of Claims and one of his associates adopts also the finding in that account of "interest from June 12, 1838, to date of payment," on the $1,111,284.70, which that account charged against the United States as "amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund." (H. R. Ex. Doc. No. 182, 53d Congress, 3d sess., p. 32.)

It will be noted that the rate of interest does not appear in this finding, but the omission has been supplied by the court by fixing it at 5 per cent. As there is not a line in the Slade and Bender report discussing this question of interest, and as the Chief Justice and his associate in their respective opinions are likewise silent upon the subject, their indorsement of this part of the finding of the account of Slade and Bender amounts to an acceptance of the *ipse dixit* of Slade and Bender as to this momentous item, amounting at the time the judgment was rendered to $3,700,000 in round numbers. On the other hand, Judge Peelle, the only member of the court who discussed this question, advanced the following very cogent reasons against the allowance of interest:

> By Revised Statutes, section 1091, this court is inhibited from allowing interest on any claim "unless upon a contract expressly stipulating for the payment of interest."

There is no provision in either of the treaties of 1835 or 1846 respecting the payment of interest, except on the specific sums to be invested as provided by the treaty of 1835, and the court must therefore look elsewhere for authority, if interest is to be allowed.

No interest can be allowed on the sum under Revised Statutes, section 2096, as the same was not received under a treaty containing a stipulation for the payment of annual interest, but on the contrary was to be expended in defraying the cost of removal, etc. Nor can interest be allowed under Revised Statutes, section 2108, as the money is not going to incompetent or orphan Indians. Nor can interest be allowed under Revised Statutes, section 3659, as no interest has accrued thereon allowable by this court, nor has the same been invested in stocks of the United States or other interest-bearing securities.

As the act of February 27, 1851, *supra*, under which the settlement of 1852 was made, authorized the payment of interest from June 12, 1838, to April 1, 1851, on the sum appropriated, it may fairly be assumed that if the sum of $1,111,284.70 now in controversy had then been settled, interest would have been paid thereon as provided by the act. But that act has performed its office and the court can not look thereto for the payment of interest, even for the period stated, so that I have grave doubts as to whether there is any provision of law authorizing the court to allow interest on

> said sum, however much I may think it ought to be allowed; but for the purposes of this case I will assume the allowance of interest and the correctness of the distribution, as set forth in the court's opinion.

It is, however, undoubtedly but fair to Slade and Bender and to the justices of the Court of Claims who have indorsed their report, to say that this allowance is probably based primarily upon the resolution of the Senate adopted September 5, 1850, which reads as follows:

> *Resolved*, That it is the sense of the Senate that interest at the rate of five per centum per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid.

This resolution had reference to the accounting with the Cherokees provided for in articles 4 and 9 of the treaty of 1846.

Pursuant to this resolution the act of February 27, 1851, making appropriation for the payment to the Cherokee Nation of the amount found due in the account rendered in accordance with article 9 of the treaty of 1846, provided for interest upon the amount appropriated at the rate of 5 per cent from June 12, 1838, until paid, but not beyond the 1st of April, 1851. But, as justly said by Judge Peelle, *supra*, "That act has performed its office and the court can not look thereto for the

payment of interest, even for the period stated." This throws the inquiry back upon the Senate resolution of September 5, 1850, and the decision of the Court of Claims and of this court in the Old Settlers case. As far as the resolution itself is concerned, it relates in terms only to the amounts found due in the accounting provided for by the treaty of 1846. But, as has already been pointed out, the Western Cherokees, through a special jurisdictional act, had their account and their settlement made in accordance therewith, reopened by suit in the Court of Claims. This suit was permitted by Congress because of the earnest contention on the part of the Western Cherokees that in the accounting made with them the cost of subsistence had been charged against the treaty fund, whereas, by resolution of the Senate, this was expressly declared to be an improper charge.

This was a contention to which there was clearly no answer, and concerning it this Court held that the suit had been authorized because Congress was convinced that a mistake had probably been made in the accounting in a matter which the Indians from the first had called attention to, and for the purpose of allowing the courts to inquire and determine that matter. "In other words, if the adjustment and settlement were found to be made upon an erroneous interpretation which led to an obvious mistake, then Congress designed that the mistake should be corrected." (148 U. S., 473-474.)

The judgment of the Court of Claims in favor of the Old Settlers covered this improper charge, which constituted the greater part of the judgment, and certain other minor charges which were shown to be also clearly improper, and allowed interest upon the amount of this judgment in accordance with the Senate resolution above referred to. This court affirmed such allowance of interest as follows:

> Under section 1091 of the Revised Statutes no interest can "be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulated for the payment of interest;" and in *Pillson* v. *The United States*, 100 U. S., 43, it was held that a recovery of interest was not authorized under a private act, referring to the Court of Claims a claim founded upon a contract with the United States, which did not expressly authorize such recovery. But in this case the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that determination was arrived at as prescribed, was accepted as valid and binding by the United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest. (9 Stat., 556, c. 91.)
>
> In view of the terms of the jurisdictional act and the conclusion reached in reference

> to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated, but not upon the item of $4,179.26, which stands upon different ground. (148 U. S., 478.)

But the facts in the present case are entirely different. The subject-matter of this claim is in no sense an item which the accounting officers in making the settlement provided for by the treaty of 1846 should obviously have included in that accounting. On the contrary, according to the decision in the Old Settlers case, their act in charging the whole cost of removal to the total $6,647,067 fund of the Cherokees was strictly warranted by the treaty of 1835 and the treaty of 1846.

Again, as has been already pointed out in this brief, by the treaty of 1846, under the authority of which those accounting officers acted, only the question of the cost of subsistence was left open, while the submission of the question of the cost of removal had been rejected from that treaty. Accordingly, any attempt on the part of the accounting officers to have rendered the account respecting the cost of removal in any other way than as was done by them would have been unwarranted usurpation. This claim, unlike that of the Western Cherokees, instead

of being for a correction of the accounting made under article 9 of the treaty of 1846, because of an obvious error in such accounting, is a claim involving an interpretation of various treaties, of the effect of a solemn settlement of and receipt in full for this very claim, of the effect of the treaty of 1893 upon that settlement and receipt in full; and, furthermore, is predicated by the Cherokee Nation solely upon the Slade and Bender account. Finally, it calls for a reversal of the decision in the Old Settlers case.

If, upon a survey of all these considerations, this Court shall reach the conclusion that the Cherokees are entitled to this claim, it is impossible to see how the resolution of the Senate of September 5, 1850, as to interest, can have any possible efficacy to provide for interest upon the claim thus found.

The United States earnestly contends that there are neither legal nor equitable grounds upon which this claim should be allowed, and asks, therefore, that as to it the judgment of the Court of Claims be reversed.

LOUIS A. PRADT,
Assistant Attorney-General.

O